

No. **637**

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1916

**ILLINOIS CENTRAL RAILROAD COMPANY and
YAZOO & MISSISSIPPI VALLEY RAILROAD
COMPANY**

Plaintiffs in Error

vs.

GEORGE R. WILLIAMS, Defendant in Error

**In Error to the Supreme Court of the State of
Mississippi**

**MOTIONS TO DISMISS OR AFFIRM,
BRIEF AND ARGUMENT FOR
PLAINTIFFS IN ERROR**

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STATEMENT

George R. Williams, the Defendant in Error, recovered a judgment for fifteen thousand dollars against the Plaintiffs in Error in a State Court in the State of Mississippi. From this judgment, Plaintiffs in Error took an appeal to the Supreme Court of Mississippi where the judgment was, upon June 26, 1916, affirmed without a written opinion.

A petition for a writ of error was by Plaintiffs in Error presented to the Chief Justice of the Supreme Court of that state upon July 22, 1916. The prayer of the petition was granted with *supersedeas*.

Motions are now pending in this court for dismissal of the writ or to affirm the judgment of the Supreme Court of Mississippi.

So far as material to the issue presented under these motions the facts in relation to the accident are not disputed, and briefly they may be stated as follows:

Upon and prior to March 15th, 1913 (date of Defendant in Error's injury), Plaintiffs in Error were Interstate carriers operating numerous cars in switch yards at Memphis, Tennessee, where Defendant in Error was employed as one of a switching crew. While in the discharge of his duties in the above mentioned yard for Plaintiffs in Error, he ascended the ladder of a car engaged in Interstate Commerce, and upon reaching a point near the top of the ladder took hold of the grabiron or handhold upon the roof of the car, which proved to be insecurely fastened and gave way, whereupon Defendant in Error fell, receiving injuries.

The Defendant in Error based his right of recovery solely upon the provisions of the Supplemental Safety Appliance Act approved April 14, 1910. No claim has been by him made of any right to recover because of the alleged breach of any common law duty between master and servant. In the briefs filed herein by counsel for defendant, any common law right to recover in this case is expressly disclaimed, and the right to recover seems based solely upon the above mentioned act of Congress.

As we have hereinafter set out the trial courts instructions to the jury, we avoid repetition by directing your honors attention to page 7 of this brief, where they are recited at length. It was and now is the contention of Plaintiffs in Error that the instructions given at the instance of Defendant in Error were incorrect and do not fairly construe the Supplemental Safety Appliance Act of 1910 in that such instructions expressly deny the valid order of a Federal authority, viz:—the Interstate Commerce Commission. We contend that a fair construction of this act clearly discloses that under the admitted facts in this case Defendant in Error has no right of action under the Supplemental Safety Appliance Act of 1910.

Contesting this construction of the act, Plaintiffs in Error sought a new trial in the trial court, which was denied.

Upon appeal to the Supreme Court of Mississippi the Plaintiffs in Error urged a reversal of the judgment for the giving of the instructions which were equivalent to a directed verdict for Defendant in Error, and could not be warranted by the terms of the Federal act which the instructions attempted to define. The judgment of the trial court was affirmed. To review this action by the Court of last resort in Mississippi this writ was prosecuted.

I

THE MOTION TO DISMISS OR AFFIRM

The question now submitted to this court arises upon a motion herein filed by the Defendant in Error for the dismissal of the writ of error, or in the event that motion be overruled, then for reasons in the motion assigned, it is asked that the judgment of the State Court from which this case came, be affirmed.

The motions so made by the Defendant in Error, as above noted, will be found to be in the form usually employed under the practice of this court in submitting this question for decision; they assign as the reasons for the relief prayed:

First—That the Federal questions presented to this court by Plaintiffs in Error prosecuting this writ are wholly formal ‘and are so absolutely devoid of merit as to be frivolous,’ and that the said questions presented have been “so explicitly foreclosed by the decisions of this court as to leave no room for real controversy.”

Second—“If the writ of error shall not be dismissed for want of jurisdiction,” then it is asked that the judgment of the Supreme Court of Mississippi be affirmed because “it is manifest that said writ of error was taken for delay only;”

"That the questions on which the decision of the case here depend are so frivolous as not to need further argument."

The words employed in this motion, follow a form, and are only pertinent at the present time as defining the issues now to be decided, which we submit are quite beside the scope of the argument of counsel for Defendant in Error. We respectfully submit that a reading of the briefs filed by Defendant in Error are not only persuasive, but quite conclusive that counsel misapprehend the purpose of the motions made herein. It is most apparent from argument filed by counsel for Defendant in Error that there is now presented to this court, as we believe for the first time, a serious Federal question which both the carrier and employe engaged in Interstate Commerce are entitled to have *decided upon the merits* as fixing their several rights under the Federal Safety Appliance Act and as defining the effect of an order by the Interstate Commerce Commission in relation to such act.

We will assume for the purpose of these motions that the statement of facts recited in the brief filed herein for Defendant in Error is correct and which without detailed reiteration disclose the following in so far as they are now material:

The Plaintiffs in Error are railroad companies and common carriers.

The Defendant in Error was an employe of one of these railroad companies.

The Defendant in Error upon the *15th day of March, 1913*, attempted to ascend the side of a car, and as he climbed a ladder upon the side of the car, he reached for the handhold or grabiron upon the top of the car, which, being insecurely fastened, gave way, whereupon Defendant in Error fell to the ground, receiving injuries.

The Defendant in Error instituted a suit against the railroad companies in a state court in the State of Mississippi to recover damages for the injuries so received.

There was and is no claim in the Defendant in Error's declaration or complaint that his suit was based upon any common law breach of duty as between master and servant.

There was and is no claim that damages should be allowed under the terms of the Federal Employers' Liability Act. The sole and only question involved in this case is the claim that the Plaintiffs in Error were liable under the terms of the Supplemental Safety Appliance Act of 1910. That was and now is the sole and only question to be considered *upon the merits* of this case.

That counsel for Defendant in Error so regard the ground of recovery we direct attention to page 9 of the brief filed by Mr. Harrington wherein the following statement occurs:

"Accordingly Congress passed the act approved April 14th, 1910, *which is the act under which this action was prosecuted to a judgment.* Although the liability of the company is undisputed *even if we were tested by the Act of 1893.*" (Italics ours.)

The Defendant in Error procured a judgment for fifteen thousand dollars in the trial court.

Upon appeal to the Supreme Court of Mississippi the judgment was affirmed without any opinion.

A petition for a writ of error presented to the Chief Justice of the Supreme Court of Mississippi by the railroad companies recites among other things the following:

"Your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 237 of the Judiciary Act, Statutes at Large of the United States, Vol. 36, p. 1156, because the said case arose under, and there was brought in question in said case the true construction of an Act of Congress commonly called the Federal Safety Appliance Act, approved April 14th, 1910, and

Acts amendatory thereto. And the Supreme Court of Mississippi denied petitioners, as we respectfully submit, the rights, privileges and immunities under said Acts of Congress in this; that it failed and declined to hold that it was error prejudicial to the petitioner railroad companies, for the trial court to give in charge to the jury, as was done, instructions on the trial of the case, instructing the jury that under Section 2 of the Act of Congress, approved April 14th, 1910, it became and was the duty of the defendant companies, on the 15th day of March, 1913, to equip and have equipped their cars which they were using on their railroads, with proper handholds, and it was the express duty of the defendants, as to all cars having ladders upon them, to have secure handholds or grabirons on the roofs, at the top of such ladders, and a failure to have secure handholds on the roofs, at the top of such ladders, was a violation of the Act of Congress, which made the defendant companies liable in damages to any employee who was injured in consequence of the violation of this law, and who at the time of such injury was engaged in the line of duty to defendant; and to instruct the jury that if they believed, from the evidence that George R. Williams, Plaintiff, in the line of his duty, went upon the car in question, in the yards of defendants, being used by them, and that by reason of a defective handhold at the top of said car, he fell and was injured, they would return a verdict in favor of the plaintiff. And to further instruct the jury that it is provided by Section 4 of the Act of April 14th, 1910, as applied to these defendant companies, that if they move or haul, or handle with commercial cars, any car which has a ladder thereon, and which has no secure handholds on the roof at the top of such ladders,

that such car is then used at the sole risk of the companies, and they are made absolutely liable in damages to any employe who is injured in the line of duty by reason of their failure to have a secure handhold; and that they are, therefore, instructed that in such case, the employe does not assume the risk of injury, but the risk is carried by the company. And to further instruct the jury for the plaintiff that it was the absolute duty of the defendants to have and maintain a safe handhold at the top of the car in question at the time in question, to-wit, 15th day of March, 1913, and a failure so to do was negligence on the part of said companies, as a matter of law."

Upon July 22nd, 1916, the Chief Justice of that court ordered the issuance of the writ of error with superse-deas.

Under the assignment of errors by Plaintiff in Error appears the following:

"First. The Supreme Court of Mississippi erred in deciding and holding that it was not error on the part of the court of original jurisdiction to give in charge to the jury the following instructions, viz: "

"Instruction No. 1. The Court instructs the jury for and on behalf of the plaintiff as follows: That under Section 2, of the Act of Congress, approved April 14th, 1910, it became and was the duty of the defendant companies, on the 15th day of March, 1913, to equip their cars which they were using on their railroads with proper handholds, and it was the express duty of the defendants, as to all cars having ladders upon them, to have secure handholds or grabirons on the roofs, at the top of such ladders, and a failure to have secure handholds on the roofs, at the top of such ladders, was a violation of the Act of Congress which made the defendant companies liable in damages to any employe who was injured in consequence of the violation of this law, and who at the time of such injury was engaged in the line of duty to

defendant. Now, therefore, if you believe from the evidence in this case that George R. Williams, plaintiff, in the line of his duty, went upon the car in question, in the yards of the defendant, being used by them, and that by reason of a defective handhold at the top of said car, he fell and was injured, you will return a verdict in favor of the plaintiff."

"And it so erred because the Act of Congress referred to did not require the equipment of the cars with handholds and grabirons on the roof, as the instruction directed, for the reason that the Act of Congress referred to requiring this was not in force on the 15th day of March, as stated in the instruction."

"Second. The Supreme Court of Mississippi further erred in deciding that it was not error on the part of the Court of original jurisdiction to give in charge to the jury the following instruction, viz:"

" 'Instruction No. 2. The Court further instructs the jury for and on behalf of the plaintiff as follows: That it is provided by Section 4 of the Act of April 14, 1910, and as applied to these defendant companies, that if they move or haul, or handle with commercial cars, any car which has a ladder thereon, and which has not secure handholds on the roof at the top of such ladders, that such car is then used at the sole risk of the companies, and they are made absolutely liable in damages to any employe who is injured in the line of duty by reason of their failure to have a secure handhold; and you are therefore, instructed that in such cases, the employe does not assume the risk of injury, but the risk is carried by the company.' "

"Third. The Supreme Court of Mississippi further erred in deciding that it was not error on the part of the court of original jurisdiction to give in charge to the jury the following instruction, viz:"

" 'Instruction No. 4. The Court instructs the jury for the plaintiff that it was the absolute duty of the defendants to have and maintain a safe handhold at the top of the car in question, and a failure so to do was

negligence on the part of said companies, as a matter of law.' ”

“In all of the particulars above stated the Supreme Court of Mississippi denied to plaintiffs in error their rights under said Acts of Congress and under the Constitution and laws of the United States.”

It will here be noted that the very question now upon the merits submitted to this court, was submitted to the trial court and was the chief reason assigned for reversal in the Supreme Court of Mississippi.

Upon the motion to dismiss this writ of error about 47 pages are consumed in one brief and something like 30 in the other to which we respectfully refer as the best evidence that counsel for Defendant in Error at least have not labored under any belief that the questions here involved are “frivolous” or settled by any decision of this court, as their entire argument purports to argue the *merits* of a serious and debatable Federal question rather than to disclose wherein this court is without jurisdiction or that the reasons assigned for suing out this writ are frivolous.

We assume that this motion is based under Section 709, of the judiciary act, which for convenience we set forth. It is as follows: “Section 709. (Judgments and decrees of state courts on writ of error.) A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, Treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by

either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ. (R. S.)”

Congress in its first session made provision for the review of judgments of state courts in the Supreme Court of the United States (Para. 25 of the Judiciary Act, September 24, 1789) and the provisions of this act except for certain changes not necessary here to be noticed are substantially those enacted at a later date and now before this court for the consideration in this motion.

So frequently has the construction of this statute been before this court that the rights of the parties litigant are thoroughly established.

It is intimated by Defendant in Error that no Federal question was preserved before the Supreme Court of Mississippi or the trial court in the State of Mississippi, and that therefore no question can now be raised nor will jurisdiction be accepted by this court.

In the above mentioned Section 709, there are three classes of cases in which the judgment of the state court may be re-examined by the Supreme Court of the United States.

1st: Where is drawn in question the validity of a treaty or statute of or authority exercised under the United States and the decision is against their validity.

2nd: Where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of it being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity.

3rd: Or where any *title, right, privilege or immunity is claimed* under the constitution or any treaty or statute or commission held or authority held or exercised under the United States and the decision is against the title, right, privilege or immunity *specially set up and claimed by either party under such constitution, statute, commission or authority.* *Home Insurance Co. v. Augusta*, 93 U. S. 116.

It will be observed that under the third class the *privilege, right or immunity* must be specifically set up or claimed to give this court jurisdiction. But where the validity of a treaty or the statute of the United States is raised or an authority exercised under the United States is drawn in question and the decision by the state court is against their validity, under a number of decisions by this court it has been decided that if the Federal question appears in the record and was decided or such decision was necessarily involved in the case and the case could not have been determined without holding such question, the fact that it was not specially set up and claimed is not conclusive against the review of such a question in this court.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254.

Columbia Water Power Co. v. Columbia Electric Street R. & L. T. Co., 168 U. S. 475.

An examination of the briefs filed in this case clearly disclose that the question involved is not a privilege, title, right or immunity claimed by the Plaintiffs in Error under the terms of any treaty or statute of the United States in operation at the time of the accident, but it is now insisted by Plaintiffs in Error that at the time of the accident there was no statute in force and effect requiring the appliances claimed by Defendant in Error to have caused his injury. In other words, it is not a question of Plaintiffs in Error claiming *an immunity*, under some Federal statute, but is the claim that *Defendant in Error did not have a cause of action under the Safety Appli-*

ance Act of 1910. That this is the clear wording of that act, under which the Interstate Commerce Commission extended the time within which certain appliances were to be supplied. That if the Act of 1910, was not in effect, there was no right, privilege or immunity to be claimed under it.

It might with some propriety be stated that while the position of counsel for Defendant in Error is without merit, if it be conceded that the Plaintiffs in Error are relying upon some "right, privilege or immunity" under the third classification of the statute above quoted they have a right to have this cause heard in this court.

In the case of *St. Louis, Iron Mountain and Southern Railway Co. v. Taylor*, 210 U. S. 281, a motion was made to dismiss the writ of error to review a judgment of the Supreme Court of Arkansas. The case involved a claim for damages under the Safety Appliance Act and it was evidently insisted that the Plaintiff in Error, in the state court, had not set up or claimed a right, privilege or immunity under any Federal Act. In an opinion by Mr. Justice Moody at page 293, the following is stated:

"The words of that section (709), material here, are those authorizing this court to re-examine the judgments of the state courts where any title, right, privilege or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed * * * under such 'statute.' There can be no doubt that the claim made here was specifically set up, claimed and denied in the state courts. The question therefore, precisely stated, is whether it was a claim of a right or immunity under a Statute of the United States. Recent decisions of this court remove all doubt from the answer to this question." (Citing *McCormick v. Market National Bank* 165 U. S. 538, and a number of other cases.) "The principles to be derived from these cases are these: *Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible*

findings of fact from the evidence may lead to a judgment in his favor and his claim being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured so that they shall have the same meaning and effect in all the States of the Union." (Italics ours.)

It will be noted that in the above case the complaint or declaration charged a violation of the Federal Safety Appliance Act in that it failed to equip certain of its cars with draw bars as required by that Act. "The defendant's answer denied that the cars were improperly equipped with draw bars and alleged that Taylor's death was the result of his own negligence" (Page 284), a mere general denial. So far as we can learn from reading of the case, there was by the defendant no special plea or claim in the pleadings of any right, title, privilege or immunity under any Federal Statute. His answer was merely not guilty and contributory negligence by the deceased.

A very brief examination of the record in this case discloses that over the objection of the Plaintiffs in Error the instructions given by the trial Judge at the instance of the Defendant in Error was a direct denial of the Plaintiffs in Error rights under the act of 1910. The giving of these instructions was assigned as a ground for new trial which was denied. The case was taken to the Supreme Court of Mississippi, where the chief ground of reversal there urged was the erroneous instructions given by the trial court construing the Act of 1910. The judgment of the lower court was there affirmed, without an opinion. The petition for a writ of error presented to the Chief Justice of the Supreme

Court of Mississippi set out in detail the very question of the trial court's error in instructing the jury as to the meaning of the Act of Congress passed in 1910. The assignment of error in this court presents no other question. We therefore insist that while the question of this court's jurisdiction does not arise under the last above mentioned clause of Section 709 of the Judiciary Act, if for any reason it should be so held, Plaintiffs in Error are within their rights in asking this court to review the action of the Supreme Court of Mississippi in affirming the judgment of the trial court in that state.

We may further suggest that under the Mississippi practice when instructions are marked "given" or "refused" they shall be taken as excepted to. *Watson v. Dickens*, 12 S. and M. (Miss.) 608. Since 1850 the practice in that state has conformed with this decision, and further under Chapter 111 of the Act of 1910, Mississippi Statutes, it is provided that a bill of exception is not necessary to review the action of the court in passing upon instructions. They are a part of the record without a bill of exceptions.

As to the claim that the question here involved has been decided by this court, and is therefore not open for further discussion, while we have at some length herein-after answered this claim, we desire to state in connection with this branch of our argument that we know of no case in which the precise question involved in this case has been before this court, and we respectfully submit it is clearly evident from the very statement of the proposition now submitted under the briefs in this case by Defendant in Error, that it is purely and exclusively a Federal question involving the construction of the Supplemental Safety Appliance Act of 1910, and the effect of an order made by the Interstate Commerce Commission.

In the case of *Louisville & Nashville Railroad Co. v. Melton*, 218 U. S. 44 (cited by Defendant in Error), suit was instituted by Melton in a state court of Kentucky. The plaintiff recovered a judgment which was affirmed by the court of last resort in that state, whereupon a writ

of error was prosecuted to this court. Motions were made therein to dismiss the writ or affirm the judgment and under an opinion rendered by Mr. Justice White the following was stated:

"We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of the state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject

anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

In the case at bar we are not aware of a single decision by this court upon the proposition involved herein, and counsel for defendant have cited none. Aside from a consideration of the question alone, the Chief Justice of the Supreme Court of Mississippi, upon the petition clearly defining the very question now submitted directed this case be sent to this tribunal for examination, and this after the Supreme Court of that state had decided the case *without any opinion*.

The decisions hereinafter discussed of three or four inferior courts do not agree upon this question, and we therefore submit the record does disclose that over the objection of Plaintiffs in Error the trial court positively and distinctly instructed the jury upon the Federal Act, involved, in such a manner that it is a distinct, direct holding against the perfectly clear meaning of the Safety Appliance Act of 1910, and a direct refusal by the courts of Mississippi to recognize and enforce a valid rule made by the Federal authority, viz:—The Interstate Commerce Commission. (See pages 61 to 63 Defendant in Error's brief and Plaintiffs in Error's motion for new trial, page 72—Defendant in Error's brief.) That the question here submitted is inherently Federal and is not in fact presented under the third classification above mentioned, but involves the very serious question of a state court so construing a Federal Statute that, it is meaningless, and the State Court's holding must be taken as a refusal to enforce a clear rule announced by a Federal authority, viz:—The Interstate Commerce Commission. If we are correct in our position then we submit that quite independent of any claim set up by the Plaintiffs in Error upon either of these questions before the State Courts, the Defendant in Error's motions should be denied. *Equitable Life Assurance Co. v. Brown*, 187 U. S. 310.

We quite concede that in any case, however thoroughly the mere jurisdiction may be established, if it appear that the issue presented is frivolous, the writ

may be dismissed, and it is the duty of the court to dismiss the writ. As to whether the question here presented is frivolous, a makeshift, a pretense to secure delay, we will at some length hereinafter discuss, but upon this motion to dismiss or affirm we suggest that this court is asked by opposing counsel to consider the merits of a serious question upon the mere assertion that it is frivolous. It has been held by this court that on error from a State Court to this court where the Federal question asserted to be contained in the record "*is manifestly lacking all color of merit*" (*Swafford v. Templeton*, 185 U. S. 488), the writ of error should be dismissed. We do not understand that the rule has ever been so extended by any decision of this court, as brief for Defendant in Error intimates, and that a motion to dismiss may at the election of a Defendant in Error be seized upon as the place to have decided the merits of a bona fide Federal question. The real issue therefore now to be decided is really whether the question now presented in the record of this case is so "*manifestly lacking all color of merit*" that it is unworthy the serious attention of this court rather than give it that deliberation which the statute above quoted indicates as necessary to decide a cause upon the merits.

Federal legislation upon Interstate Commerce has coined many problems for this court to solve. In the main they involve questions about which the master and servant do not agree. Indirectly it is perhaps the question "*as old as the hills,*" viz:—each insisting upon a construction of these Federal acts that will the least disturb what they evidently regard as their natural rights. Now and then, as in all classes of litigation, unwarranted and vexatious appeals are taken, but an examination of the decisions by this court can only lead one to the inevitable conclusion, that this tribunal has never hesitated to consider upon the merits any question seriously involving the construction of the acts affecting Interstate Commerce. We therefore respectfully submit that this motion to dismiss for want of jurisdiction in this court is without good cause and should be overruled.

II

IS THE PROPOSITION NOW SUBMITTED FRIVOLOUS?

In discussing this question we wish to again direct attention to these facts in this case, viz: that the Defendant in Error at the time he received his injuries was not engaged in coupling or uncoupling cars, nor was he using a grabiron or handhold placed upon cars, as required by the terms of any safety appliance act or amendment thereto passed prior to April 14, 1910; that the Defendant in Error was climbing a ladder upon the side of a car and upon taking hold of the handhold or the grabiron upon the roof of the car, the same gave way and he fell to the ground.

Defendant in Error, as before stated, does not seek to recover upon any common law theory of negligence growing out of the relationship of master and servant, nor is there any pretense or claim that this action is brought under or supported by any of the provisions of the Federal Employers' Liability Act. Upon the contrary, counsel for Defendant in Error expressly disclaim any right to recover under the common law and the Federal Employers' Liability Act, expressly affirming that the Defendant in Error's right to recover exists solely under the Supplemental Safety Appliance Act of 1910. This being the Defendant in Error's claim we feel that we are quite at liberty to confine our remarks to this single issue as submitted by counsel for Defendant in Error. It is quite evident therefore that the questions now to be determined are: (a) What construction shall be given the Supplemental Safety Appliance Act of 1910; (b) Has the Interstate Commerce Commission by any valid order extended the time for the carriers' compliance with the statute passed in 1910; and, (c) Has the question now here presented for consideration been so decided by this court that the question here involved is settled and determined.

These questions we submit in the order above named.

A: WHAT CONSTRUCTION SHALL BE GIVEN THE SUPPLEMENTAL ACT OF 1910?

It is the contention of counsel for the Defendant in Error that the Plaintiffs in Error as interstate carriers and employers became and were bound under any circumstances at all times after July 1st, 1911, to have, keep and maintain upon all cars safe handholds upon the roof of all cars upon which ladders were in use, and a failure so to do, resulting in injuries to an employee, rendered the carrier liable, solely because of and under the provisions of the Supplemental Safety Appliance Act of 1910.

It might be well in this connection to note that the Supplemental Safety Appliance Act of 1910 did not destroy the servant's right of action for the breach of a common law duty existing before and at the time this law went into effect, nor did it in any way abridge or destroy any right of action arising under the Federal Employers' Liability Act. The purpose of the Supplemental Act of 1909 was not to destroy existing remedies for any injuries for which a right of action existed prior to that time. We submit its purpose was to compel the railroads to furnish certain equipment for their cars and locomotives, the absence of which did not necessarily constitute an act of common law negligence by the company. It does not therefore follow that the intimations by counsel for Defendant in Error, that railroad employees injured upon defective ladders or defective handholds upon the roofs or at other places upon cars were without relief and remedy where such ladder or handhold or equipment there placed before 1910 without any order of law, was defective. It is intimated by opposing counsel that the object of the Supplemental Act of 1910, as controlled by Section 3, was to grant to the Interstate Commerce Commission power to see to the *standardization* of equipment, rather than to compel carriers to equip their cars with the appliances named in Section 2. That the legislation was designed to enforce *standardization* and the appliances named in Section 2 are evi-

dently to be regarded as incidental. Counsel for Defendant in Error argue with some emphasis that there is no distinction between "grabirons" upon various parts of a car. It is claimed that the "grabiron" or "handhold" under the original act in 1893 and a "grabiron" or "handhold" at any place other than designated in the act of 1893 are all within the provisions of the original act of 1893. In this connection we beg to differ with counsel, as it will be noted that under the act of 1893 the wording is most significant in that it specifically provides under Section 4, "it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with grabirons or handholds *in the ends and sides of each car for greater security to men in coupling and uncoupling cars.*"

It will be noted that under the Supplemental Act of 1910 for the first time appears the following: "All cars requiring secure ladders * * * shall be equipped with such ladders * * * and all cars having ladders shall be so equipped with secure handholds or grab irons on their roofs at the top of such ladders." We are not aware of any case in which this court has been called upon to construe the meaning of the above phrase quoted from the act of 1893, but in the case of *Pennell v. Philadelphia & R. R. Co.*, 231 U. S. Page 675, (a case again hereinafter referred to) this court had occasion to construe the Safety Appliance Act in relation to automatic couplers. In that case it was contended that under the Federal Act automatic couplers were required between the tender and locomotive, this court said (680):

"It is of special significance, therefore that in its (The Interstate Commerce Commission) order, under the act of April 14th, 1910 (86 Stat. at L. 298, Chapt. 160 U. S. compiled Stat. Supp. 1911, p. 1327) which was supplemental to the other acts, designating the number, dimensions, locations and manner of application of certain appliances, it provided as follows: 'Couplers:—Locomotives shall be equipped with automatic

couplers at rear of tender and front of locomotives.' *That is couplers were required where danger might be incurred by employees.*" (Italics ours.) Clearly indicating that words used in the act or in an order by the Commission defining the place upon the car where the appliances *must* be placed, control, as defining the only appliances required by the act.

In the case of *United States v. Boston & Maine Railroad Co.*, 168 Fed. 48, the court held that a man connecting or disconnecting air hose between the cars is engaged in coupling or uncoupling cars and charged the jury that Section 4 of the act of 1893 requires secure grab irons or handholds at those points in the end of each car where they are necessary in order to afford greater security to men coupling and uncoupling cars.

In *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. at 870, the court said that the purpose of requiring grab irons or handholds to be placed at the end of cars in interstate commerce seems to have been to afford greater security for employees when they are in the act of coupling or uncoupling cars. See also *Campbell v. Spokane & I. E. R. Co.*, 188 Fed. 516.

It will be noted that the only reference made in Section 4 of the act of 1893 for grab irons or handholds is in the ends and sides of cars *for greater security to men in coupling and uncoupling cars*. So expressed to fix with certainty the location of the only grab irons provided for in the act, to decrease danger to men who were coupling and uncoupling cars. We do not wish to be understood as saying that if an employee engaged in some duty other than coupling or uncoupling cars, took hold of the grab iron or handhold in the end or side of a car and through a defect in such appliance he was hurt that he could not recover under the provisions of that act,—we insist, however, that it is quite clear, the only requirement for placing the grab iron at any place upon any car under the act of 1893, was in the sides and ends of cars so adjusted as to afford greater security to men in coup-

ling and uncoupling cars and that at no other point or points upon the cars were grab irons or handholds required, and if a grab iron or handhold was placed upon a car at some other place, and if through a defective condition an employee was hurt his right of action would be under a possible common law obligation, certainly not under the Safety Appliance Act of 1893.

It is only by virtue of the act of 1910 that any provision was ever made for the construction of grab irons or handholds upon the roof of a car at the top of the ladder, and if a liability exists because or on account of a defective grab iron or handhold in the roof of the car it must necessarily be under and by virtue of the Supplemental Act of 1910.

May we again direct attention to the Safety Appliance Act of 1893. Among the material things required of interstate carriers by this act was to equip cars, first with automatic couplers; second, continuous brakes; third, driving wheel brakes for the locomotives; fourth, grab irons or handholds in the ends and sides of cars to afford greater security to men in coupling and uncoupling cars. This act was approved March 2, 1893, and under its terms the act fixed the time for compliances as to driving wheel brakes for locomotives and a train brake system at January 1st, 1898. The same date was fixed for the law becoming effective as to automatic couplers.

Section 4 of the act provides in express terms that from and after July 1st, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful to use a car that is not provided with grab irons in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Section 7 provides that the Interstate Commerce Commission may from time to time upon full hearing, and for good cause, extend the period within which any common carrier shall comply with the provisions of this act.

A time was fixed by the act designating a period for a compliance with the act. It is also clearly evident

that Congress knew the tremendous task imposed upon the carrier. It also knew that there was an authority perhaps better qualified to do justice to the carrier and to the public generally than Congress. What Congress intended to and did do was to pass a law requiring this equipment, and expressly gave power to the Interstate Commerce Commission to designate and fix a period within which the equipment should be upon the cars, and this as the commission in its wisdom would deem to be the best interests of all concerned. It was for the commission to work out the solution of this problem, which involved the welfare of the public generally, the interstate carrier, and the employee. It was for the Commission to determine the ability of the carrier to do the work without obstructing the commerce of the country. It was for the Commission to design and specify the dimension and location of the appliances. By this initial legislation sprung into existence a power hitherto unknown in our form of Government. It was the instrumentality through which Congress intended that a great movement should become a living, vital thing. Its power was supreme, and the wisdom of the Act of 1893 has become more manifest year after year, and the subsequent amendments to that act, have never limited, but have always tended to broaden the power and authority of that commission. In the very first instance Congress gave the Commission absolute power to fix the time within which such law should become effective. This was the spirit of the scheme as it was crystalized in that law, and we are aware of no case where the power of the Interstate Commerce Commission in this particular has been denied.

There was an amendment to this act in 1903, in which Congress again recognized the supreme power of the Interstate Commerce Commission to control the proposition of railroad equipment by designating it as the proper body to increase or decrease the minimum percentage of cars in any train required to be operated with power or train brakes;—Congress clearly recognizing the commission as a board of commerce, legally con-

stituted by law, the right arm of Congress, with full and complete power to enforce the provisions of the various Federal Acts as and in the manner it deemed best.

In 1910 the act was passed under which the present controversy arises. It will be noted that this act is not an independent act. That is, an act disconnected from all other legislation upon like questions. It constitutes a part of the continuous legislation upon safety appliances to be used by interstate carriers. Congress designated this act of 1910 as "An Act to supplement an act to promote," etc. (Designating the act of 1893 and the amendments thereto.)

For convenience and reference we set this Supplemental act out in full. It is as follows:

LADDERS, HAND BRAKES, HAND HOLDS

An act to supplement "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to every common carrier and every vehicle subject to the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act, to haul, or permit to be hauled or used

on its lines any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of the Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this sec-

tion with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such move-

ment is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Sec. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

Sec. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this Act.

Approved, April 14, 1910.

After the passage of this supplemental act the Interstate Commerce Commission entered four orders, one of which is set out in full in one of the briefs filed by the defendant in error in this case. The second is in part set out in the same brief. The third and fourth are omitted, and to the two omitted we briefly direct attention as having some bearing upon the question now under consideration.

One of the orders to which we refer was entered June 6, 1910, and fixed the standard height of the minimum percentage of brake power under the amendment in 1903. (*Thornton*, page 460.) It will be noted that this was seven years after the date fixed by the act, after which date it was unlawful to use cars not so equipped.

The other order was made by the Interstate Commerce Commission, October 10th, 1910. (*Thornton* 461.) It refers to the third section of the act of 1910, approved April 14th, 1910, and recites, among other things that the Interstate Commerce Commission in pursuance of authority in it vested to modify and to prescribe the standard height of draw bars, (as provided in the act of 1893) and to fix the time within which such modification or change shall become effective and obligatory, made a rule that the standard height of draw bars be modified (specifying the change) and concluding with the following: "And it is further ordered that such modification or change shall become effective and obligatory December 31, 1910." It will be noted that Section 5 of the act of 1893 provides, "And after July 1, 1895, no cars, either loaded or unloaded, shall be in interstate commerce traffic which do not comply with the standard above provided for."

Upon the 13th day of March in 1911, two orders were made by the Interstate Commerce Commission, both of which refer specifically to the Supplemental Safety Appliance Act of 1910. One of these orders is in part set out in the brief for the defendant in error. As we deem it more or less important we have caused the entire order to be printed and placed in the back of this argument, where it will be found on page 53.

The other order for convenience, we here recite in full.

INTERSTATE COMMERCE COMMISSION
ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of March, A. D. 1911.

Present:

JUDSON C. CLEMENTS,	}	Commissioners.
CHARLES A. PROUTY,		
FRANKLIN K. LANE,		
EDGAR E. CLARK,		
JAMES S. HARLAN,		
CHARLES C. MCCORD,		
BALTHASAR H. MEYER,		

In the matter of the extension of the period within which the requirements of an act entitled, "An act to supplement 'an act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes and for other purposes; and other safety appliance acts, and for other purposes,'" approved April 14, 1910, as amended by "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911.

Whereas, Pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by

its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by Section 2 of the act aforesaid and Section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, known as the "Safety Appliance Acts"; and whereas the matter of extending the period within which common carriers shall comply with the provisions of Section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown:

It is ordered, That the period of time within which said common carriers shall comply with the provisions of Section 3 of said act in respect of the equipment of cars in service on the 1st day of July, 1911, be, and the same is hereby, extended as follows, to-wit:

FREIGHT-TRAIN CARS

(a) Carriers are not required to change the brakes from right to left side on steel or steel underframe cars with platform end-sills, or to change the end-ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13, 1911.

(b) Carriers are granted an extension of five years from July 1, 1911, to change the location of brakes on all cars other than those designated in paragraph (a) to comply with the standards prescribed in said order.

(c) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order in respect of all brake specifications contained therein, other than those designated in paragraphs (a) and (b), on cars of all classes.

(d) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have ten or more inches end-ladder clearance, within thirty inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at

which time they must be made to comply with the standards prescribed in said order.

(e) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than ten inches end-ladder clearance, within thirty inches of side of car, to comply with the standards prescribed in said order.

(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running-boards, ladders, sill-steps and brake-staffs; *Provided*, that the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of handholds (except end-handholds under end-sills), ladders, sill-steps, brake-wheels, and brake-staffs on freight-train cars where the appliances are within three inches of the required location, except that when cars undergo repairs they must be made to comply with the standards prescribed in said order.

PASSENGER-TRAIN CARS

(h) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

LOCOMOTIVES, SWITCHING

(i) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

LOCOMOTIVES, OTHER THAN SWITCHING

(j) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

A true copy.

Edw. A. Moseley,
Secretary.

It will be noted that these two orders are to be effective at once. That one (above set forth) refers to and is in relation to "extension of the period within which common carriers shall comply with the requirements of an act entitled," etc., (designating the Supplemental Act of 1910).

The other order relates solely to standardization, to size, number and manner of placing the equipment *without any provision whatever for an extension of time to the railroad companies in so doing.*

It is insisted by counsel for defendant in error that the order extending the time period herein above set forth does not apply to the provisions of the statute as to ladders and grab irons on the roof of the car, and that if any such order be made, the Interstate Commerce Commission was without authority so to do.

It certainly must be conceded that the only safety appliance act making any provision for ladders and grab irons on the roof a car is under the Supplemental Safety Appliance Act of 1910. We do not believe we are overstating the proposition when we say that if the act of 1910 made no provision as to such ladders and grab irons on the roof of the car, that the defendant in error is without remedy under the Supplemental Safety Appliance Act of 1910. The Supplemental act of 1910 in its provisions as to ladders and grab irons upon the roof of cars will be noted as providing in section 2 thereof that "all cars *requiring* secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall be equipped with secure handholds or grab irons on their roofs at

the top of such ladders." It will be noted that *every* car is not to be equipped with ladders. Only cars *requiring* secure ladders shall be so equipped. And who is to determine this question? The railroad company, the employee, the Master Car Builders Association, the Interstate Commerce Commission, or is it a question of fact to be determined by the courts in each particular case, whether under the circumstances the particular car was one of the type used for a purpose which *required* a secure ladder or a *secure handhold or grab iron* at the top of the ladder? Counsel for defendant in error wishes this court to understand that he is not discussing *ladders*, but "handholds" or "grab irons." We are quite willing that he should rest his proposition upon so narrow a ground, for it is utterly immaterial whether his strained construction be granted or rejected, inasmuch as it is perfectly clear that the only provision for either is in the same act, one linked with the other—they are inseparable, and must be considered as a part really of but one equipment or appliance. The wording of Section 2 is as follows: "All cars requiring secure ladders * * * shall be equipped with such ladders and running boards," then note a coma, and the act proceeds: "And all cars having ladders shall *also* be equiped with secure handholds or grab irons on their roofs at the top of *such* ladders." Under the construction sought by counsel for the defendant in error the act might read something in this manner: All cars must be equipped with continuous air brakes; all cars requiring automatic couplers shall be equipped with automatic couplers; all cars requiring ladders shall be equipped with ladders; all cars *now* having ladders shall be equipped with handholds or grab irons on their roofs at the top of such ladder. In other words, they seek to take the latter part of the above mentioned sentence and read it without reference to the preceding words. It will be noted that the Interstate Commerce Commission did not construe the act as counsel for defendant in error does. We believe it was clearly intended that the commission was the only authority to determine the cars "*requiring* secure ladders." It will

be noted that the commission's order of standardization inserted in the back of this brief completely specifies equipment for some fifteen or sixteen types of cars all of which is provided for in Section 2 of the act of 1910, and in some seven, or perhaps eight, of these types of cars it was determined that they were not cars *requiring* secure ladders, for none are specified or provided for, and it might with some emphasis be said that nowhere in the record in this case can be found any tagible evidence to disclose that the defendant in error fell from a car *requiring* a secure ladder or that there is any evidence whatever to bring the Plaintiffs in Error within the provisions of the Supplemental Act of 1910.

The contention of the defendant in errors is: that it is immaterial whether a ladder was *required* for a car or not. If there was a ladder, then immediately after the time stated in the act July 1, 1911, there must be a secure grab iron or handhold on the roof of it. It becomes wholly immaterial what provisions, if any, were made by Congress as to the ladders, they may be decayed, unfit for use, or what not. Only the handhold must be secure. And if the man fell *from the ladder* and was injured before the expiration of the time fixed by the Interstate Commerce Commission he could not recover under the Supplemental Safety Appliance act, but if he fell from a *defective handhold*, a part of the same appliance, a recovery was assured. We ask with some emphasis, is there any reason why Congress should have provided that the lower rung of the ladder should be put upon the car within fifteen months, and that an extension of time might be granted for five years to place the roof handhold on the car. If under the act of 1910 there is any sane reason for the claimed distinction between the grab iron on the roof of a car and the ladder approaching it, with all due respect to counsel for defendant in error we have been unable to discover it in their briefs.

In *Pennell v. Philadelphia & R. R. Co.*, 231 U. S. 675, an action was brought under the Federal Safety Appliance Act.

The tender and locomotive were coupled with link and pin which pulling apart killed the fireman. There was a judgment for the company.

Believing the opinion in that case is worthy of special note in considering the construction of the words in the Act of 1910, viz: "All cars requiring secure ladders * * * shall be equipped with such ladders * * * and all cars having ladders shall also be equipped with secure hand holds or grab irons on the roofs at the top of such ladders."

We quote the following:

"It is further contended by plaintiff that the necessity of an automatic coupler between engine and tender is determined by the amendment of the act of 1893, enacted in 1903 (32 Stat. at L. 943, Chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314). It may be necessary, it is said, under the statute of 1893, to 'bring the word 'tender' within the definition of the word 'car,' " but that this 'is totally unnecessary when we come to consider and apply the subsequent statutes, because here we find the word 'tender' specifically used, and used, too, in evident contradiction to the words 'locomotives' and 'cars.' " The amendment repeats the title of the prior acts, provides that their provisions "shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type," and that their provisions and requirements, including automatic couplers, "shall be held to apply to all trains, locomotives, tenders, cars, and smaller vehicles on any railroad engaged in interstate commerce." But this act does not destroy the integrity of the locomotive and tender. It is entirely satisfied by requiring the automatic coupler between the tender and the cars constituting the train, that is, to the rear end of the tender. And this requirement fulfils the purpose of the statute, which, we have seen, does not re-

gard the strength of the connections between the cars, even if it may be supposed that an automatic coupler is the stronger, but does regard safety in making and unmaking the connections. This being kept in mind, the construction of the statute is not difficult. And the construction of the statute is the main concern. If it is not mandatory, as we think it is not, of an automatic coupler between the engine and the tender, the contentions of plaintiff are without foundation. We need not refer to them with further detail except to say that the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

B: HAS THE INTERSTATE COMMERCE COMMISSION BY ANY VALID ORDER EXTENDED THE TIME FOR THE CARRIER'S COMPLIANCE WITH THE STATUTE PASSED IN 1910?

We ask that an inspection be made of the Interstate Commerce Commission's order in relation to standardization, to which we have before referred, in this, that in a number of instances there is no provision whatever for either ladders or grab irons in the top of the car above such ladder. Now until the Interstate Commerce Commission has designated what car or cars shall require secure ladders with handholds upon the roof of such cars, what possible liability can arise under the safety appliance act?

Under Section 3 of the Supplemental act of 1910 it is provided:

a. Within six months from the passage of the act, the Interstate Commerce Commission shall designate the number, dimensions, location and manner of application of the appliances named in section 2 (this includes ladders, running boards and grab irons on the roof of cars).

b. Notice of the Commission's action shall be given to all common carriers, and thereafter such number, lo-

cation and manner of application shall remain as the standard of equipment.

c. Under Section 3 the Interstate Commerce Commission may extend the period within which any common carrier "shall comply with the provisions of this (3rd) section with respect to the equipment of cars actually in service upon the date of the passage of this act." It is claimed by the defendant in error that the power given the commission to extend the time specifically refers to the things to be done in Section 3 and Section 3 only, and inasmuch as the provision for secure grab irons upon the roof of the car over such ladders is in Section 2, the Interstate Commerce Commission did not have the power, and Congress did not intend that it should have the power, to make any extension of time as to the provisions of Section 2. That this position is clearly erroneous, we submit is very clear on a brief examination of the act.

Every appliance provided for in the Supplemental Act of 1910 is named and stated in Section 2 of the act, and in no other section. Section 3 is for the sole purpose of vesting power in the commission to carry into effect the provisions of Section 2, and this in a manner and at time to be determined by the Commission. If the construction be placed upon Section 3 now advanced by opposing counsel, there is not a single appliance named in the act of 1910 for the application of which the commission could have extended the time period beyond July 1, 1911. For none are required or stated in Section 3 of the act.

Section 3 of the act provides, "That within six months from the passage of this act the Interstate Commerce Commission, after full hearing, shall designate the number, dimensions, location and manner of application of the *appliances provided for by Section 2 of this act* and Section 4 of the act of March 2, 1893, * * * provided that the Interstate Commerce Commission may on full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of

cars actually in service upon the date of the passage of this act." * * *

It is very clear that Section 2 is so named that it was embodied in and became a part of Section 3. Reading the act as an entirety, is it possible to hold that it was the intention of Congress to require the carrier to place upon its cars sill-steps, hand brakes, ladders and hand-holds by July 1, 1911? To require that they be standardized and so placed under the direction of the Interstate Commerce Commission, and that the Interstate Commerce Commission was authorized by the act to withhold the specifications for at least six months out of the fifteen, which upon the face of the act would leave the carrier approximately eleven months within which to comply with the provisions of this act.

Counsel for defendant in error insist that Congress granted a reasonable time in stating fifteen months as the period within which the act was to be complied with.

Upon the face of the act *six months* after the passage of the act the Interstate Commerce Commission was allowed to fix the number, dimensions, location and manner of application of the appliances. So that as a matter of fact, the carrier has from, approximately, September 1, 1910, to July 1, 1911. A glance at the order entered by the Interstate Commerce Commission as to the details to be worked out in the equipment of practically every car in the United States, discloses the utter absurdity of this position. There were approximately 1300 interstate railroads in the United States. There are approximately 2,000,000 cars. The larger part of these cars were in active service, supplying the demands of the commercial world. They were scattered far and near. Many of them moved slowly. They could not as a whole be withdrawn from the service. The railroad shops would not at any one time hold two per cent of the cars. They were to be supplied with sill-steps, efficient hand brakes, ladders, running boards and grab irons on the roof of every car over every ladder—all this, not to be selected at the whim or the judgment of some master mechanic, but to be in di-

rect conformity with the rules, dimensions and numbers fixed by the Interstate Commerce Commission; and this within a period of eleven months. This as we read the face of the act. But it appears that as a matter of fact the order by the Interstate Commerce Commission was not entered until the *13th day of March in 1911*.

Brief reference is here made to the act of Congress, passed March 4, 1911, or nine days before the order was entered by the Commission. The act was embraced in Sundry Civil Appropriation Act for the fiscal year ending June 30, 1912. (C 285, H. R. 32909.)

It is as follows:

"That the jurisdiction of the Interstate Commerce Commission to extend the period within which any common carrier shall comply with the provisions of section three of the Act entitled, 'An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety-appliance Acts, and for other purposes,' approved April fourteenth, nineteen hundred and ten, shall apply to cars actually placed in service between the date of the passage of said Act and the first day of July, nineteen hundred and eleven, in the same manner and to the same extent that it applies to cars actually in service upon the date of the passage of said Act."

Turning again to the order of the Commission of March 13, 1911, it will be seen:

It specifically states that the number, dimensions, location and manner of application of the appliances provided for by Section 2 of the act of April 14, 1910, and Section 4 of the act of March 2, 1893, shall be as follows:
 * * * so that in reality it was not until the *13th day of March in 1911*, the order was made allowing to the

carrier three months and seventeen days within which to repair and re-equip practically every railroad car in the United States; and this without hindrance or delay to the wheels of commerce.

But it is said by counsel that they are not discussing ladders. They are evidently not discussing efficient hand brakes, nor running boards, nor sill-steps. They all are a part of Section 2. It will be noted from the order of the Interstate Commerce Commission that the specifications provide for the location and number of the secure handholds or grab irons at the end of the car. What possible theory can a construction be had by which everything is eliminated from Section 3 except "secure grab upon the roof of the cars where there are ladders and that all else was legitimately extended under the order of the Interstate Commerce Commission until 1916?

We respectfully submit that under the construction sought by counsel for defendant in error an impossible burden would have been placed upon the railroad companies. The railroad companies knew it, the employees knew it, Congress knew it, and it gave to the commission the power to extend this time. Therefore the Interstate Commerce Commission entered the rule granting an extension of five years, until July 1, 1916, under this title:

"IN THE MATTER OF THE EXTENSION OF THE PERIOD WITHIN WHICH COMMON CARRIERS SHALL COMPLY WITH THE REQUIREMENTS OF AN ACT ENTITLED AN ACT TO SUPPLEMENT AN ACT TO PROMOTE THE SAFETY OF EMPLOYEES," etc. And again, "Whereas pursuant to the provisions of the act above stated the Interstate Commerce Commission by its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location and manner of application of the *appliances provided for by Section 2 of the act aforesaid* * * * and *whereas the manner of extending the period within which common carriers shall comply with the provisions of Section 2 of the act first aforesaid*, being under consideration, upon full hearing and for good cause shown:

It is ordered that the period of time within which said common carriers shall comply with the provisions of Section 3 of said act in respect to the equipment of cars in service on the first day of July in 1911, be, and the same is hereby extended as follows."

Under section f, (page 31 herein) of this order, and after having extended the time as to various parts of Section 2 it is provided: "Carriers are granted an extension of five years from July 1, 1911, to change *and apply all other appliances on freight cars* to comply with the standard prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car it must then be equipped according to the standard prescribed in said order in respect to handholds, running boards, ladders, sill-steps and brake-staffs."

It is certainly true that the order of the Interstate Commerce Commission is not binding upon this court in construing the statute, but it certainly is entitled to consideration, inasmuch as it is the big factor that is working out the problem in relation to railroad matters in this country. And under this order it will be specifically noted that Section 3 is clearly to be taken as containing all of the equipment provided for in Section 2. There is not a single provision made in this order for an extension of time as to any equipment that is not provided for in Section 2 of the Supplemental Act of 1910, and as indicated by the italics in our quotation from this order handholds are specifically mentioned as one of the things involved in the extension of five years from July 1, 1911; and as to these handholds there can certainly be no question but that it applies specifically to handholds on the top of cars upon which ladders were required upon cars requiring the same.

In this connection it is interesting to note that upon September 15, 1915, certain carriers applied to the Commission for extension of time beyond that named in the order of March 13, 1911.

The matter was decided November 2, 1915. Under the report made by the Commission at that time, after setting forth the extension granted under the above named order they state the following:

"It is urged as a principal basis for relief that the carriers have acted in good faith and have made an earnest effort to comply with the Commission's requirements, but that because of the financial and, to a certain extent, the physical difficulties involved, they will not be able fully to meet these requirements within the prescribed time."

"Out of a total of 2,025,254 cars in service on July 1, 1911, on roads having a total mileage of about 232,000 miles, it is estimated by the carriers that 1,669,064 cars, or about 82 per cent, will be either equipped in accordance with the order or removed from service by July 1, 1916, leaving about 356,000 cars still unequipped on that date. No information is available which will show, for the purpose of comparison, the yearly progress made in equipping the above 1,669,064 cars. The following table, however, compiled from data submitted by the carriers at and subsequent to the hearing, indicates the progress of equipment with respect to 89 lines having a total mileage of 203,652 miles and an individual mileage of approximately 300 miles or over, and will perhaps afford a more comprehensive view of the general situation:

Cars in service July 1, 1911.....1,849,222

Cars equipped year ended June 30—	
1912.....	122,213
1913.....	283,599
1914.....	315,184
1915.....	336,938

Total cars equipped June 30, 1915 1,057,934

Estimated number of cars to be equipped or removed from service year ending June 30, 1916.....	483,432
Estimated number of cars equipped by July 1, 1916.....	1,541,366
Estimated number of cars unequipped on July 1, 1916.....	307,856

It thus appears that about 57 per cent. of the above cars were equipped on July 30, 1915, and that it is estimated that about 83 per cent. will be either equipped or removed from service by July 1, 1916.

It may be conceded that the year ending June 30, 1914, was an abnormal one in railroad-ing and that the general business depression during that period had a marked effect upon the volume of traffic, resulting in a large decrease in revenue. During the past fiscal year the financial difficulties of many of the roads have doubtless been aggravated by reason of the war. It is stated on behalf of the carriers that this is particularly true of those roads in the southern section of the country and that these roads experienced a decrease in gross revenues of from 10 to 20 per cent. due to the fact that their principal commodities were so vitally affected.

Notwithstanding these conditions it appears that, while there are a number of exceptions as to individual roads, the figures as a whole show a gradual increase in the number of cars equipped during each successive year and that the greatest number of cars was equipped in 1914 and 1915.

In this connection it is perhaps proper to take into consideration that some time was consumed in making the necessary preparation and preliminary plans for an undertaking of this magnitude, involving, it is stated, an expenditure of about \$45,000,000. It is also doubtless

true that as the carriers gained a more thorough working knowledge of the requirements they were in a position to equip a larger number of cars in a given period."

Again:

"Another and most important consideration which must be borne in mind is that the purpose of the Congress in enacting this statute was the conservation of human life and limb. While we can not entirely ignore the necessities of the carriers, yet, when we consider that any extension, however short, may result in the death or injury of an employee by reason of the fact that a safety appliance is insecurely applied, or is missing or beyond his reach owing to lack of uniformity in equipment, it is manifest that too great weight should not be given to arguments of hardship and inconvenience to the exclusion of the interests of the employees and of the public.

Upon consideration of all the facts and circumstances appearing of record, we are of opinion and find that a further extension of 12 months is adequate, and that this extension should be uniform to all common carriers subject to said act of April 14, 1910. The time granted common carriers by paragraphs (b), (c), (e), and (f) of the order of the Commission of March 13, 1911, "In the matter of the extension of the period within which common carriers shall comply with the requirements of an act entitled, 'An act to supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes and for other purposes," approved April 14, 1910, as amended by "An act making

appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911, "will accordingly be further extended for a period of 12 months from July 1, 1916."

An appropriate order will be entered."

Thereupon an order was entered in which the commission found that certain railroads having made application for a further extension of time within which to comply with the provisions of *Section 3* of an act, etc. (designating the act of 1910 and 1911) ordered that the period of time granted under the former order be extended twelve months as to certain paragraphs named in said order including "F" above referred to.

C: HAS THE QUESTION NOW HERE PRESENTED FOR CONSIDERATION BEEN SO DECIDED BY THIS COURT THAT THE QUESTION INVOLVED IS SETTLED AND DETERMINED?

With some care we have examined the two briefs submitted by counsel for defendant in error, and we have been unable to find cited a single authority deciding the question involved in this case.

In the case of *Coleman v. I. C. R. R. Co.*, Advance Sheets N. W. Reported, Jan. 28, 1916, 155 N. W. page 763, the very issue in this case was submitted and the holding by the Supreme Court of Minnesota was directly against the contention of the plaintiffs in error in this suit.

An examination of this case will disclose that the plaintiff in that suit brought an action under the Supplemental Safety Appliances Act approved April 14, 1910. The evidence discloses that while the plaintiff was attempting to climb a ladder upon the side of one of the defendant's cars one of the rungs being insecure, pulled out, plaintiff fell to the ground and was injured. At the close of the plaintiff's testimony a motion was made by the defendant railroad company for a directed verdict. The motion was allowed. For the same cause involved in

this case, namely, that under the order of extension made by the Interstate Commerce Commission under the Act of 1910, the defendant railroad Company was relieved until the expiration of the time named in that order from placing secure ladders upon its cars. The issues were narrowed and more clearly defined by the attorney for the plaintiff injecting into the record the claim that his right to recover was based solely upon the provisions of the Supplemental Safety Appliance Act of 1910.

The Supreme Court of Minnesota in this case after reciting the various acts of congress in relation to Safety Appliances and after setting forth the substance of the order by the Interstate Commerce Commission and quoting at some length from Section 2 of the Supplemental Act of 1910 stated the following:

“The sole purpose of this part of the statute was to impose upon the railroads the absolute duty of maintaining their car equipments in safe condition for use. The language is clear and positive, and declares that on and after the date named it shall be unlawful to use such cars when not so equipped. It will not, as we read it, admit of qualification by judicial construction, and was intended to apply to cars in use at the time the act was passed as well as those thereafter brought into service. Section 3, upon which defendant relies in support of the contention that Section 2 was under suspension, relates to an entirely different branch of the same subject, and clearly was not intended as a qualification of the express provisions of Section 2. It was evidently deemed that the safety of the traveling public, as well as railroad employes engaged in the train service, would best be protected by some uniform method or standard of car equipment applicable to all interstate roads, and to that end authority to fix such standard was, by Section 3, vested in the Interstate Commission. The reasons for the requirement of uniformity in equipment are

plain. The cars of different roads operating throughout the states are promiscuously hauled, all are not equipped in the same manner, and a train composed of cars differently supplied with the appliances referred to in the statute results in confusion to the employes, and adds materially to the dangers connected with their work. With a uniformity of equipment confusion is eliminated and danger of injury lessened. So it seems clear that the sole purpose of Section 3 was to authorize the Commission to prescribe a uniform standard for the equipment of the cars of all the interstate railroads, and to require conformity therewith by such roads. The Commission was by the terms of the statute required to formulate rules fixing such standard within the time stated therein, and its order in the premises was given the force and effect of law. Congress had in mind that it would, as to some of the roads, be a practical impossibility to at once meet the demands of the new standard, and the Commission was further authorized to extend to them such time as would afford full opportunity of compliance. But in so providing it clearly was not the intention that during the period taken for installing the standard equipment defective cars might be used and employed in the train service; nor was it intended that during that period Section 2 of the act should remain operative. If such had been the intention, then that section might well have been omitted altogether, and Section 3 made the substance and embodiment of the whole enactment. For then its operation would have been limited and in harmony with the contention of defendant, namely, as an enactment requiring, within such time as the Interstate Commission might fix therefor, all railroads to equip and conform their cars to the standard there provided for. This

view of the act cannot be adopted without doing violence to Section 2. Congress intended that Section 2 be a part of the statute, and the clear language thereof cannot be rejected, or held inoperative pending the installation of the standard of equipment to be ordered by the Commission without running counter to the main purpose of the Act. The section must therefore stand, as a part of the Statute, and be construed as imposing the duty upon railroads of maintaining their car equipment in secure and safe condition for use after July 1, 1911. Section 3 must be construed as a requirement of a uniform standard for such equipment, and that the extension of time within which to conform thereto has no reference to, and does not relieve from, the duty to maintain present equipment in secure and safe condition."

It was contended there as it is contended here by the Plaintiff in Error viz.: the Illinois Central Railroad Company that to hold Section 3 of the Act of 1910 as the only part of the Act of 1910 extended by the order of Interstate Commerce Commission was wrong.

Note that the Minnesota Court says "So it seems clear that the sole purpose of Section 3 was to authorize the Commission to prescribe a uniform standard for the equipment of cars for all the interstate railroads and to require conformity therewith with such roads." It will be observed that some of the most important provisions made by the Safety Appliances Act for the equipment of cars for safety appliances was under the terms and provisions of the act of 1910. How unfair the construction would be to contend that under Section 2 this equipment was required and the date which was to fix the number, the size and the designs of such equipment was left to the arbitrary will of the Interstate Commerce Commission to fix when and as they liked.

We also submit that it completely destroys the theory advanced by the defendant in error in this case. Counsel

for the defendant in error herein insists that they are not submitting a construction of the act for ladders but for grab irons, intimating that the provisions of the act in relation to ladders, sill-steps and the like is probably extended and they rely upon that part of the sentence in Section 2 which provides "and all cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the top of such ladders." The Supreme Court of Minnesota says that Section 3 of the act of 1910 was the only part of the act extended by the order of the Interstate Commerce Commission. And that the object of Section 2 is not to be taken as having any application to the equipment provided therein. And that Section 2 cannot be held inoperative pending the installation of the standard of equipment to be ordered by the Commission without running counter to the main purpose of the act.

By what process Section 2 can possibly be excluded from Section 3 and considered as not within its terms, we are quite at a loss to understand and we respectfully submit with all due respect to the Supreme Court of Minnesota that the reasoning announced in the Coleman case but illustrates and emphasizes our construction of the act itself, and we respectfully submit that the decision by the Supreme Court of Minnesota is not sustained by a fair analysis of the Act.

Much emphasis is made by counsel for defendant in error upon the case of *Texas & Pacific Ry. Co. v. Rigsby*, in the Advance Sheets of the Supreme Court Reporter, dated May 15, 1916. We have read this case with some care. The question involved in the case at bar was neither raised nor discussed, nor was this court called upon to decide the question here involved.

No order of the Interstate Commerce Commission was submitted. The sole, simple question there was an insistence by the railroad company, that Rigsby was not within the protection of the act because he was not coupling or uncoupling cars at the time he was injured, and this court distinctly, by inference, recognizes the dis-

tinction hereinbefore made between the act of 1893 and the act of 1910 by stating that the reference made under the above claim was to Section 4 of the act of 1893 which requires "secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." Then says the opinion: "This action was not based upon that provision, however, but upon Section 2 of the amendment of 1910, and sets out Section 2 of the act of 1910, and adds the following: "There can be no question that a box car having a hand brake operated from the roof *requires a secure ladder to enable the employee to safely ascend and descend*, and that the provision quoted was intended for the special protection of employees engaged in duties such as that which the plaintiff was performing."

That is exactly what we have contended the construction of the act of 1910 means, and which is expressly denied by counsel for defendant in error. The ladder and the handhold upon the roof of the car are equipments which are not to be divided, or considered apart.

The proposition involved in the case at bar is, when did the law of 1910 go into effect. If the Interstate Commerce Commission had the power and authority to make this order, and if the railroad company under that order was given a valid, legal extension of the rule within which to comply with the provisions of that statute then we submit that the act does not become effective, and that no recovery can be had thereunder until the time named in the order of the Interstate Commerce Commission has expired. The claim by counsel for defendant in error is that this court is bound by the Rigsby case, and should refuse to consider the question now presented, evidently, upon the theory of *stare decisis*. We submit that as a general rule where a principle of law has become settled by a series of decisions it is of course binding upon the courts and should be followed, but that a single decision is not necessarily binding. The doctrine is not imperative, and an opinion is not an authority for what is not mentioned therein and what does not appear to have been

suggested to the court from which the opinion emanates. *Durousseau v. United States*, 6 Cranch, 307, ex part Crane, 5 Pet. 203, *Decatur v. Paulding*, 14 Pet. 607, *Gage v. Parker*, 178 Ill. 455; *Larson v. First Nat. Bank*, 92 N. W. (Neb.) 729.

We therefore respectfully submit that the rule asked for in this motion in behalf of defendant in error is without merit and should not be considered.

III

GRAB IRONS OR HANDHOLDS UNDER THE ACT OF 1893

In one of the briefs we find the following: "The act of 1893 requiring these grab irons upon the sides and ends of cars. *including of course the grab irons on the roof.*" (Page 7.)

Again: "So by the act of 1903 the railroads were required to have these grab irons or handholds on all cars which they used." Again on page 9, under Section III, "In order to get a clear view of this act let us consider what appliances were required by the Act of 1893. Here they are." Then after quoting the provision for certain equipment under two sections appears the following: "3. Requiring them (meaning the railroads) to have handholds and grab irons on their cars for greater security of *the men.*" It will be noted with some interest that in quoting the provision of the act of 1893 upon page 9 of this brief there is an omission of the provision of the statute which is material, in this, the act provides that the cars shall be equipped with secure grab irons or handholds in the *ends and sides of each car* "for greater security to men *in coupling and uncoupling cars.*" (Italics indicate omissions.) The act of 1910 provides that all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders. The remarkable part of the argument advanced in said brief is the assumption that grab

irons for every part of a car were required under the act of 1893, and that anything about a car evidently is a "grab iron" within the meaning of that act, and notwithstanding the express wording of the act of 1893 as to the location and purpose for grab irons as there provided anything may be designated as "grab iron" and is required under the law of 1893.

That this theory is erroneous we submit is clearly evident.

IN CONCLUSION

The premises considered we say:

- 1: This court has jurisdiction of this cause.
- 2: The issue here is not frivolous and has not been decided by this court.
- 3: That a fair construction of the Supplemental Safety Appliance Act of 1910, granted to the Interstate Commerce Commission power to extend the time for compliance with Section 2 of that act, and,
- 4: That the Commission did by virtue of that power extend the time until July 1, 1916.

That the Defendant in Error therefore has no cause of action under the Supplemental Act of 1910.

Respectfully submitted.

CHARLES C. LEFORGEE,
Attorney for Plaintiff in Error.

MR. BLEWETT LEE,
MR. CHARLES N. BURCH,
MR. ROBERT B. MAYS,
Of Counsel.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of March, A. D. 1911.

Present:

JUDSON C. CLEMENTS,	}	Commissioners.
CHARLES A. PROUTY,		
FRANKLIN K. LANE,		
EDGAR E. CLARK,		
JAMES S. HARLAN,		
CHARLES C. MCCORD,		
BALTHASAR H. MEYER,		

IN THE MATTER OF DESIGNATING THE NUMBER, DIMENSIONS, LOCATION, AND MANNER OF APPLICATION OF CERTAIN SAFETY APPLIANCES.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate

Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29 and 30 and October 7, 1910, respectively; and February 27, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act, and superseding the Commission's order of October 13, 1910, relative thereto

It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

BOX AND OTHER HOUSE CARS

HAND-BRAKES:

Number: Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Pate A.

Dimensions: The brake-shaft shall be not less than one and one-fourth ($1\frac{1}{4}$) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16), inches in diameter, of malleable iron, wrought iron or steel.

Location: The hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application: There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Top brake-shaft support shall be fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets. (See Plate A.)

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred. (See Plate A.)

Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths ($\frac{7}{8}$) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-chain shall be of not less than three-eighths ($\frac{3}{8}$), preferably seven-sixteenths ($\frac{7}{16}$), inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenth ($\frac{7}{16}$), preferably one-half ($\frac{1}{2}$), inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half ($\frac{1}{2}$) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.)

ORDER

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths ($\frac{3}{4}$), preferably one (1), inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring. (See Plate A.)

Brake-shaft drum shall be not less than one and one-half ($1\frac{1}{2}$) inches in diameter. (See Plate A.)

Brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square fit shall be not less than one and five-sixteenths ($1\frac{5}{16}$) inches square. When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ($5\frac{1}{4}$), preferably five and one-half ($5\frac{1}{2}$), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.)

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five-eighths ($\frac{5}{8}$) of an inch in diameter, or upon a trunnion secured by not less than one-half ($\frac{1}{2}$) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths ($\frac{3}{4}$) of an inch in diameter; said

nut shall be secured by riveting over or by the use of a lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square fit for brake-shaft in hub of said wheel; taper of said fit nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-Step:

If brake-step is used, it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Manner of Application: Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths ($\frac{3}{8}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, which shall be securely fastened to body of car with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

Running-Boards:

Number: One (1) longitudinal running-board.

On outside-metal-roof cars two (2) latitudinal extensions.

Dimensions: Longitudinal running-board shall be not less than eighteen (18), preferably twenty (20), inches in width.

Latitudinal extensions shall be not less than twenty-four (24) inches in width.

Location: Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to ladder locations, except on refrigerator cars where such latitudinal extensions can not be applied on account of ice hatches.

Manner of Application: Running-boards shall be continuous from end to end and not cut or hinged at any point: *Provided*, That the length and

width of running-boards may be made up of a number of pieces securely fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill; and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial metal braces.

Running-boards shall be made of wood and securely fastened to car.

SILL-STEPS:

Number: Four (4).

Dimensions: Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum clear depth, eight (8) inches.

Location: One (1) near each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Sill-steps exceeding twenty-one (21) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

LADDERS:

Number: Four (4).

Dimensions: Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of side ladder treads shall be uniform within a limit of two (2) inches from top ladder tread to bottom tread of ladder.

Maximum distance from bottom tread of side ladder to top tread of sill step, twenty-one (21) inches.

End ladder treads shall be spaced to coincide with treads of side ladders, a variation of two (2) inches being allowed. Where construction of car will not permit the application of a tread of end ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder.

Hard-wood treads, minimum dimensions one and one-half ($1\frac{1}{2}$) by two (2) inches.

Iron or steel treads, minimum diameter five-eighths ($\frac{5}{8}$) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder treads to corner of car.

Manner of Application: Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

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Stiles of ladders, projecting two (2) or more inches from face of car, will serve as foot-guards.

Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets. Three-eighths ($\frac{3}{8}$) inch bolts may be used for wooden treads which are gained into stiles.

END-LADDER CLEARANCE:

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

ROOF-HANDHOLDS:

Number: One (1) over each ladder.

One (1) right-angle handhold may take the place of two (2) adjacent specified roof-handholds, provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: On roof of car: One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, *except* on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

Manner of Application: Roof-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$)

inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

SIDE-HANDHOLDS:

Number: Four (4).

[Tread of side-ladder is a side-handhold.]

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

HORIZONTAL END-HANDHOLDS:

Number: Eight (8) or more. (Four (4) on each end of car.)

[Tread of end-ladder is an end-handhold.]

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

A handhold fourteen (14) inches in length may be used where it is impossible to use one sixteen (16) inches in length.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) near each side on each end of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, when tread of end-ladder is an end-hold. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill or sheathing over end-sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

On each end of cars with platform end-sills six (6) or more inches in width, measured from end-post or siding and extending entirely across end of car, there shall be one additional end-handhold not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application: Horizontal end-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

VERTICAL END-HANDHOLES:

Number: Two (2) on full-width platform end-sill cars, as heretofore described.

Dimensions: Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, eighteen (18), preferably twenty-four (24), inches.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) on each end of car opposite ladder, not more than eight (8) inches from side of car; clearance of bottom end of handhold shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

Manner of Application: Vertical end-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

UNCOUPLING-LEVERS:

Number: Two (2).

Uncoupling-levers may be either single or double, and of any efficient design.

Dimensions: Handles of uncoupling-levers, *except* those shown on Plate B or of similar designs, shall be not more than six (6) inches from sides of car.

Uncoupling-levers of design shown on Plate B and of similar designs shall conform to the following-prescribed limits:

Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift-arms shall be not less than seven (7) inches long.

Center of eye at end of center lift-arm shall be not more than three and one-half ($3\frac{1}{2}$) inches beyond center of eye of uncoupling-pin of coupler when horn of coupler is against the buffer-block or end-sill. (See Plate B.)

End of handles shall extend not less than four (4) inches below bottom of end-sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Plate B.)

Handles of uncoupling-levers of the "rocking" or "push-down" type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

Location: One (1) on each end of car.

When single lever is used it shall be placed on left side of end of car.

HOPPER CARS AND HIGH-SIDE GONDOLAS WITH FIXED ENDS

[Cars with sides more than thirty-six (36) inches above the floor are high-side cars.]

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box or other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of, and not more than twenty-two (22) inches from, center.

Manner of Application: Same as specified for "Box and other house cars."

BRAKE-STEP: Same as specified for "Box and other house cars."

SILL-STEPS: Same as specified for "Box and other house cars."

LADDERS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars," *except* that top ladder-tread shall be located not more than four (4) inches from top of car.

Location: Same as specified for "Box and other house cars."

Manner of Application: Same as specified for "Box and other house cars."

Side-Handholds: Same as specified for "Box and other house cars."

HORIZONTAL END-HANDHOLDS: Same as specified for "Box and other house cars."

VERTICAL END-HANDHOLDS: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

END-LADDER CLEARANCE:

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler horn against the buffer-lock or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

DROP-END HIGH-SIDE GONDOLA CARS.**HAND-BRAKES:**

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

SILL-STEPS: Same as specified for "Box and other house cars."

LADDERS:

Number: Two (2).

Dimensions: Same as specified for "Box and other house cars," *except* that top ladder-tread shall be located not more than four (4) inches from top of car.

Location: One (1) on each side, not more than eight (8) inches from right end of car, measured from inside edge of ladder-stile or clearance of ladder-and other house cars."

Manner of Application: Same as specified for "Box and other house cars."

SIDE-HANDHOLDS: Same as specified for "Box and other house cars."

HORIZONTAL END-HANDLES:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

END-LADDER CLEARANCE:

No part of car above end sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

FIXED-END LOW-SIDE GONDOLA AND LOW-SIDE HOPPER CARS.

[Cars with sides thirty-six (36) inches or less above the floor are low-side cars.]

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not more than twenty-two (22) inches from center.

Manner of Application: Same as specified for "Box and other house cars."

BRAKE-STEP: Same as specified for "Box and other house cars."

SILL-STEPS: Same as specified for "Box and other house cars."

SIDE-HANDHOLDS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

HORIZONTAL END-HANDHOLDS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each side on each end of car not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit. Clearance of outer end of handhold shall be not more than (8) inches from side of car.

One (1) near each side of each end of car on face of end sill, projecting outward or downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

END-LADDER CLEARANCE:

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-step, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

DROP-END LOW-SIDE GONDOLA CARS

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars," provided that top brake shaft support may be omitted.

SILL-STEPS: Same as specified for "Box and other house cars."

SIDE-HANDHOLDS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top or side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

END-LADDER CLEARANCE:

No part of car above end sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

FLAT CARS

[Cars with sides twelve (12) inches or less above the floor may be equipped the same as flat cars.]

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on the end of car to the left of center, or on side of car not more than thirty-six (36) inches from right-hand end thereof.

Manner of Application: Same as specified for "Box and other house cars."

SILL-STEP: Same as specified for "Box and other house cars."

SIDE-HANDHOLDS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

TANK-CARS WITH SIDE-PLATFORMS

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

SILL-STEPS: Same as specified for "Box and other house cars."

SIDE-HANDHOLDS:

Number: Four (4) or more.

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands, four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

TANK-HEAD HANDHOLDS:

Number: Two (2). [*Not required if safety-railing runs around ends of tank.*]

Dimensions: Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel. Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

Location: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application: Tank-head handholds shall be securely fastened.

SAFETY-RAILINGS:

Number: One (1) continuous safety-railing running around sides and ends of tank, securely fastened to tank or tank-bands at ends and sides of tank; or two (2) running full length of tank at sides of car supported by posts.

Dimensions: Not less than three-fourth ($\frac{3}{4}$) of an inch, iron.

Location: Running full length of tank either at side supported by posts or securely fastened to tank or tank-bands, not less than thirty (30) nor more than sixty (60) inches above platform.

Manner of Application: Safety-railings shall be securely fastened to tank-body, tank-bands or posts.

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

END-LADDER CLEARANCES

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft brackets, brake-wheel or uncoupling lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle

when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END-PLATFORMS

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

RUNNING-BOARDS:

Number: One (1) continuous running-board around sides and ends; or two (2) running full length of tank, one (1) on each side.

Dimensions: Minimum width on sides, ten (10) inches.

Minimum with on ends, six (6) inches.

Location: Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

Manner of Application: If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with

coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SILL-STEPS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each end on each side under side-handhold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Same as specified for "Box and other house cars."

LADDERS: [*If running-boards are so located as to make ladders necessary.*]

Number: Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

Dimensions: Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half ($1\frac{1}{2}$) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths ($\frac{5}{8}$) of an inch.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

Manner of Application: Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

SIDE-HANDHOLDS:

Number: Four (4) or more.

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank-bands four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank-band.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Same as specified for "Box and other house cars."

TANK-HEAD HANDHOLDS:

Number: Two (2). [*Not required if safety-railing runs around ends of tank.*]

Dimensions: Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches

Location: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within

six (6) inches of outer diameter of tank at point of application.

Manner of Application: Tank-head handholds shall be securely fastened.

SAFETY-RAILINGS:

Number: One (1) running around sides and ends of tank or two (2) running full length of tank.

Dimensions: Minimum diameter, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two and one-half ($2\frac{1}{2}$) inches.

Location: Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

Manner of Application: Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

END-LADDER CLEARANCE:

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

TANK CARS WITHOUT END-SILLS

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

BRAKE-STEP: Same as specified for "Box and other house cars."

RUNNING-BOARDS:

Number: One (1).

Dimensions: Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

Location: Continuous around sides and ends of tank.

Manner of Application: If running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank-bands.

SILL-STEPS:

Number: Four (4). [*If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.*]

Dimensions: Same as specified for "Box and other house cars."

Location: One (1) near each on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Steps exceeding eighteen (18) inches in depths shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with one-half ($\frac{1}{2}$) inch rivets.

SIDE-HANDHOLES:

Number: Four (4) or more.

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each end on each side of car over sill-step, on running-board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side on each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

Manner of Application: Same as specified for "Box and other house cars."

SAFETY-RAILINGS:

Number: One (1).

Dimensions: Minimum diameter seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Minimum clearance two and one-half ($2\frac{1}{2}$) inches.

Location: Safety-railings shall be continuous around sides and ends of car, not less than thirty (30) nor more than sixty (60) inches above running-board.

Manner of Application: Safety-railings shall be securely fastened to tank or tank-bands, and secured against end shifting.

UNCOUPLING-LEVERS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars," *except* that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

Location: Same as specified for "Box and other house cars," *except* that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

END-LADDER CLEARANCE:

No part of car above buffer-block within thirty (30) inches from side of car, *except* brake-shaft, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than exceptions herein noted, shall extend beyond the face of buffer-block.

CABOOSE CARS WITH PLATFORMS

HAND-BRAKES:

Number: Each caboose car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions: Same as specified for "Box and other house cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars with platforms shall be located on platform to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

RUNNING-BOARDS:

Number: One (1) longitudinal running-board.

Dimensions: Same as specified for "Box and other house cars."

Location: Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application: Same as specified for "Box and other house cars."

LADDERS:

Number: Two (2).

Dimensions: None specified.

Location: One (1) on each end.

Manner of Application: Same as specified for "Box and other house cars."

ROOF-HANDHOLDS:

Number: One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Dimensions: Same as specified for "Box and other house cars."

Location: On roof of caboose, in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Manner of Application: Same as specified for "Box and other house cars."

CUPOLA-HANDHOLDS:

Number: One (1) or more.

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) continuous handhold extending around top of cupola not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

Manner of Application: Cupola-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside and riveted over or with not less than one-half ($\frac{1}{2}$) inch rivets.

SIDE-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, thirty-six (36) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) near each end on each side of car, curving downward toward center of car from a point not less than thirty (30) inches above platform to a point not more than eight (8) inches

from bottom of car. Top end of handhold shall be not more than eight (8) inches from outside face of end sheathing.

Manner of Application: Same as specified for "Box and other house cars."

END-HANDHOLDS:

Number: Four (4).

Dimensions: Same as specified for "Box and other house cars."

Location: Horizontal: One (1) near each side on each end of car on face of platform end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of platform end-sill.

Manner of Application: Same as specified for "Box and other house cars."

END-PLATFORM-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) right-angle handhold on each side of each end extending horizontally from door-post to corner of car at approximate height of platform-rail, then downward to within twelve (12) inches of bottom of car.

Manner of Application: Handholds shall be securely fastened with bolts, screws, or rivets.

CABOOSE PLATFORM-STEPS:

Safe and suitable box steps leading to caboose platforms shall be provided at each corner of caboose.

Lower tread of step shall be not more than twenty-four (24) inches above top of rail.

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

CABOOSE CARS WITHOUT PLATFORMS

HAND-BRAKES:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other cars."

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars without platforms shall be located on end of car to the left of center.

Manner of Application: Same as specified for "Box and other house cars."

BRAKE-STEP: Same as specified for "Box and other house cars."

RUNNING-BOARDS:

Number: Same as specified for "Box and other house cars."

Dimensions: "Same as specified for "Box and other house cars."

Location: Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

Manner of Application: Same as specified for "Box and other house cars."

SILL-STEPS: Same as specified for "Box and other house cars."

SIDE-DOOR STEPS:

Number: Two (2) [*if caboose has side-doors*].

Dimensions: Minimum length, five (5) feet.

Minimum width, six (6) inches.

Minimum thickness of tread, one and one-half (1½) inches.

Minimum height of back-stop, three (3) inches.

Maximum height from top of rail to top of tread, twenty-four (24) inches.

SIDE-DOOR HANDHOLDS:

Number: Four (4): Two (2) curved, two (2) straight.

Dimensions: Minimum diameter five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) curved handhold, from a point at side of each door opposite ladder, not less than thirty-six (36) inches above bottom of car, curving away from door downward to a point not more than six (6) inches above bottom of car.

One (1) vertical handhold at ladder side of each door from a point not less than thirty-six (36) inches above bottom of car to a point not more than six (6) inches above level of bottom door.

Manner of Application: Side-door handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

HORIZONTAL END-HANDHOLDS:

Number: Same as specified for "Box and other house cars."

Dimensions: Same as specified for "Box and other house cars."

Location: Same as specified for "Box and other house cars," *except* that one (1) additional end-handhold shall be on each end of cars with platform end-sills as heretofore described, unless car has door in center of end. Said handhold shall be not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

Manner of Application: Same as specified for "Box and other house cars."

VERTICAL END-HANDHOLDS: Same as specified for "Box and other house cars."

UNCOUPLING-LEVERS: Same as specified for "Box and other house cars."

PASSENGER-TRAIN CARS WITH WIDE VESTIBULES

HAND-BRAKES:

Number: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

SIDE-HANDHOLDS:

Number: Eight (8).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, metal.

Minimum clear length, sixteen (16) inches.

Minimum clearance, one and one-fourth ($1\frac{1}{4}$), preferably one and one-half ($1\frac{1}{2}$), inches.

Location: Vertical: One (1) on each vestibule door post.

Manner of Application: Side-handholds shall be securely fastened with bolts, rivets or screws.

END-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Handholds shall be flush with or project not more than one (1) inch beyond vestibule face.

Location: Horizontal: One (1) near each side on each end projecting downward from face of vestibule end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side car.

Manner of Application: End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they can not be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

UNCOUPLING-LEVERS:

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

PASSENGER-TRAIN CARS WITH OPEN END-PLATFORMS**HAND-BRAKES:**

Number: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

END-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

Location: Horizontal: One (1) near each side of each end on face of platform end-sill, projecting downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of end-sill.

Manner of Application: End-handholds shall be securely fastened with bolts or rivets.

END PLATFORM-HANDHOLDS:

Number: Four (4). [*Cars equipped with safety-gates do not require end platform-handholds.*]

Dimensions: Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches, metal.

Location: Horizontal from or near door-post to a point not more than twelve (12) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform. Horizontal portion shall be not less than twenty-four (24) inches in length nor more than forty (40) inches above platform.

Manner of Application: End platform-handholds shall be securely fastened with bolts, rivets, or screws.

UNCOUPLING-LEVERS:

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

PASSENGER-TRAIN CARS WITHOUT END-PLATFORMS

HAND-BRAKES:

Number: Each passenger-train car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

Location: Each hand-brake shall be so located that it can be safely operated while car is in motion.

SILL-STEPS:

Number: Four (4).

Dimensions: Minimum length of tread ten (10), preferably twelve (12), inches.

Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches or equivalent, wrought iron or steel.

Minimum clear depth eight (8) inches.

Location: One (1) near each end on each side not more than twenty-four (24) inches from corner of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than two (2) inches inside of face of side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

SIDE-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16), preferably twenty-four (24), inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Horizontal or vertical: One (1) near each end on each side of car over sill-step.

If horizontal, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

If vertical, lower end not less than eighteen (18) nor more than twenty-four (24) inches above center line of coupler.

Manner of Application: Side-handholds shall be securely fastened with bolts, rivets or screws.

END-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Horizontal: One (1) near each side on each end projecting downward from face of end-sill or sheathing. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

Manner of Application: Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

End-handholds shall be securely fastened with bolts or rivets.

When marker sockets or brackets are located so that they can not be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

END-HANDRAILS: [*On cars with projecting end-sills.*]

Number: Four (4).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) on each side of each end, extending horizontally from door-post or vestibule-frame to a point not more than six (6) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform end-sill; horizontal portion shall be not less than thirty (30) nor more than (60) inches above platform end-sill.

Manner of Application: End hand-rails shall be securely fastened with bolts, rivets or screws.

SIDE-DOOR STEPS:

Number: One (1) under each door.

Dimensions: Minimum length of tread, ten (10), preferably twelve (12), inches.

Minimum cross-sectional area, one-half ($\frac{1}{2}$) by one one-half ($1\frac{1}{2}$) inches or equivalent, wrought iron or steel.

Minimum clear depth, eight (8) inches.

Location: Outside edge of tread of step not more than two (2) inches inside of face of side of car.

Tread not more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

Manner of Application: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Side-door steps shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

A vertical handhold not less than twenty-four (24) inches in clear length shall be applied above each side-door step on door-post.

UNCOUPLING-LEVERS:

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground. Minimum length of ground uncoupling attachment, forty-two (42) inches, measured from center line of end of car to handle attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachment shall be so applied that the coupler can be operated from the left side of car.

STEAM LOCOMOTIVES USED IN ROAD SERVICE

TENDER SILL-STEPS:

Number: Four (4) on tender.

Dimensions: Bottom tread not less than eight (8) by twelve (12) inches, metal.

[*May have wooden treads.*]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location: One (1) near each corner of tender on sides.

Manner of Application: Tender sill-steps shall be securely fastened with bolts or rivets.

PILOT SILL-STEPS:

Number: Two (2).

Dimensions: Tread not less than eight (8) inches in width by ten (10) inches in length, metal.

[May have wooden treads.]

Location: One (1) on or near each end of buffer-beam outside of rail and not more than sixteen (16) inches above rail.

Manner of Application: Pilot sill-steps shall be securely fastened with bolts or rivets.

PILOT-BEAM HANDHOLDS:

Number: Two (2).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14), preferably sixteen (16), inches.

Minimum clearance, two and one-half ($2\frac{1}{2}$) inches.

Location: One (1) on each end of buffer-beam.

[If uncoupling-lever extends across front end of locomotive to within eight (8) inches of end of buffer-beam, and is seven-eighths ($\frac{7}{8}$) of an inch or more in diameter, securely fastened, with a diameter, securely fastened, with a clearance of two and one half ($2\frac{1}{2}$) inches, it is a handhold.]

Manner of Application: Pilot-beam handholds shall be securely fastened with bolts or rivets.

SIDE-HANDHOLDS:

Number: Six (6).

Dimensions: Minimum diameter, if horizontal, five-eighths ($\frac{5}{8}$) of an inch, if vertical, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Horizontal, minimum clear length, sixteen (16) inches.

Vertical, clear length equal to approximate height of tank.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Horizontal or vertical: If vertical, one (1) on each side of tender within six (6) inches of rear or on corner, if horizontal, same as specified for "Box and other house cars."

One (1) on each side of tender near gangway; one (1) on each side of locomotive at gangway; applied vertically.

Manner of Application: Side-handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

REAR-END HANDHOLDS:

Number: Two (2).

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14) inches.

Minimum clearance two (2), preferably two and one-half ($2\frac{1}{2}$) inches.

Location: Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of tender.

Manner of Application: Rear-end handholds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets.

UNCOUPLING-LEVERS:

Number: Two (2) double levers, operative from either side.

Dimensions: Rear-end levers shall extend across end tender with handles not more than twelve (12), preferably nine (9), inches from side of tender with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location: One (1) on rear end of tender and one (1) on front end of locomotive.

Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Manner of application: Uncoupling-levers shall be securely fastened with bolts or rivets.

COUPLERS: Locomotives shall be equipped with auto-couplers at rear of tender and front of locomotive.

STEAM LOCOMOTIVES USED IN SWITCHING SERVICE

FOOTBOARDS:

Number: Two (2) or more.

Dimensions: Minimum width of tread, ten (10) inches, wood.

Minimum thickness of tread, one and one-half ($1\frac{1}{2}$), preferably two (2) inches.

Minimum height of back-stop, four (4) inches above tread.

Height from top of rail to top of tread, not more than twelve (12) nor less than nine (9) inches.

Location: Ends or sides.

If on ends, they shall extend not less than eighteen (18) inches outside of gauge of straight track, and shall be not more than twelve (12) inches shorter than buffer-beam at each end.

Manner of Application: End footboards may be constructed in two (2) sections, *provided* that practically all space on each side of coupler is filled; each section shall be not less than three (3) feet in length.

Footboards shall be securely bolted to two (2) one (1) by four (4) inches metal brackets, *provided* footboard is not cut or notched at any point.

If footboard is cut or notched or in two (2) sections, not less than four (4) one (1) by three (3) inches metal brackets shall be used, two (2) located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end-sill or tank-frame by not less than two (2) seven-eighths ($\frac{7}{8}$) inch bolts.

If side footboards are used, a substantial handhold or rail shall be applied not less than thirty (30)

inches nor more than sixty (60) inches above tread of footboard.

SILL-STEPS:

Number: Two (2) or more.

Dimensions: Lower tread of step shall be not less than eight (8) inches by twelve (12) inches, metal. *[May have wooden treads.]*

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12), inches.

Location: One (1) or more on each side at gangway secured to locomotive or tender.

Manner of Application: Sill-steps shall be securely fastened with bolts or rivets.

END-HANDHOLDS:

Number: Two (2).

Dimensions: Minimum diameter, one (1) inch, wrought iron or steel.

Minimum clearance, four (4) inches, *except* at coupler casting or braces, when minimum clearance shall be two (2) inches.

Location: One (1) on pilot buffer-beam; one (1) on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than six (6) inches from ends of buffer-beam or end-sill, securely fastened at ends.

Manner of Application: End-handholds shall be securely fastened with bolts or rivets.

SIDE-HANDHOLDS:

Number: Four (4).

Dimensions: Minimum diameter, seven-eighths ($\frac{7}{8}$) of an inch, wrought iron or steel.

Clear length equal to approximate height of tank.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Vertical. One (1) on each side of tender near front corner; one (1) on each side of locomotive at gangway.

Manner of Application: Side-handholds shall be securely fastened with bolts and rivets.

UNCOUPLING-LEVERS:

Number: Two (2) double levers, operative from either side.

Dimensions: Handles of front-end levers shall be not more than twelve (12), preferably nine (9), inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender, with a guard bent on handle to give not less than two (2) inches clearance around handle.

Location: One (1) on rear end of tender and one (1) on front end of locomotive.

HANDRAILS AND STEPS FOR HEADLIGHTS:

Switching-locomotives with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

END-LADDER CLEARANCE:

No part of locomotive or tender *except* draft-rigging, coupler and attachments, safety-chains, buffer-block, foot-board, brake-pipe, signal-pipe, steam-heat pipe or arms of uncoupling-lever shall extend to within fourteen (14) inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer-block or end-sill.

COUPLERS: Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

SPECIFICATIONS COMMON TO ALL STEAM LOCOMOTIVES

HAND-BRAKES:

Hand-brakes will not be required on locomotives nor on tenders when attached to locomotives.

If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand-brakes.

RUNNING-BOARDS:

Number: Two (2).

Dimensions: Not less than ten (10) inches wide. If of wood, not less than one and one-half ($1\frac{1}{2}$) inches in thickness; if of metal, not less than three-sixteenths ($\frac{3}{16}$) of an inch, properly supported.

Location: One (1) on each side of boiler extending from cab to front end near pilot-beam. [*Running-boards may be in sections. Flat-top steam-chests may form section of running-board.*]

Manner of Application: Running-boards shall be securely fastened with bolts, rivets or studs.

Locomotives having Wootten type boilers with cab located on top of boiler more than (12) inches forward from boiler-head shall have suitable running-boards running from cab to rear of locomotive, with handrailings not less than twenty (20) nor more than forty-eight (48) inches above outside edge of running-boards, securely fastened with bolts, rivets or studs.

HANDRAILS:

Number: Two (2) or more.

Dimensions: Not less than one (1) inch in diameter, wrought iron or steel.

Location: One on each side of boiler extending from near cab to near front end of boiler, and extending across front end of boiler, not less than twenty-four (24) nor more than sixty-six (66) inches above running-board.

Manner of Application: Handrails shall be securely fastened to boiler.

TENDER OF VANDERBILT TYPE:

Tenders known as the Vanderbilt type shall be equipped with running-boards; one (1) on each side of tender not less than ten (10) inches in width and one (1) on top of tender not less than forty-eight (48) inches in width, extending from coal space to rear of tender.

There shall be a handrail on each side of top running-board, extending from coal space to rear of tank, not less than one (1) inch in diameter and not less than twenty (20) inches in height above running-board from coal space to manshole.

There shall be a handrail extending from coal space to within twelve (12) inches of rear of tank, attached to each side of tank above side running-board, not less than (30) nor more than sixty-six (66) inches above running board.

There shall be one (1) vertical end handhold on each side of Vanderbilt type of tender, located within eight (8) inches of rear of tank extending from within eight (8) inches of top of end-sill to within eight (8) inches of side handrail. Post supporting rear end of side running-board if not more than two (2) inches in diameter and properly located, may form section of handhold.

An additional horizontal end handhold shall be applied on rear end of all Vanderbilt type of tenders which are not equipped with vestibules. Handhold to be located not less than thirty (30) nor more than sixty-six inches above top of end-sill. Clear length of handhold to be not less than forty-eight (48) inches.

Ladders shall be applied at forward ends of side running-boards.

HANDRAILS AND STEPS FOR HEADLIGHTS:

Locomotives having headlights which can not be safely and conveniently reached from pilot-beam or steam-chests shall be equipped with secure

handrails and steps suitable for the use of men in getting to and from such headlights.

A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets.

COUPLERS: Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Cars of construction not covered specifically in the foregoing sections, relative to handholds, sill-steps, ladders, hand-brakes and running boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill-steps, ladders, hand-brakes and running-boards as are required for cars of the nearest approximate type.

“RIGHT” or “LEFT” refers to side of person when facing end or side of car from ground.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent below size given is permitted.

And it is further ordered, That a copy of this order be at once served on all common carriers, subject to the provisions of said act, in a sealed envelope by registered mail.

By the Commission:

EDWARD A. MOSELEY, *Secretary.*

A true copy.

EDWARD A. MOSELEY,
Secretary.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 637.

ILLINOIS CENTRAL RAILROAD CO., ET AL.,
Plaintiffs in Error.

vs.

GEORGE R. WILLIAMS,
Defendant in Error.



MOTIONS TO DISMISS OR AFFIRM.

Now comes the Defendant in Error, George R. Williams, by his attorneys, and moves the Court to dismiss the writ of error in this case to the judgment of the Supreme Court of the State of Mississippi, for want of jurisdiction, because,

First. The Federal questions presented are wholly formal, and so absolutely devoid of merit as to be frivolous, and have been so explicitly foreclosed by the decisions of this Court as to leave no room for real controversy.

Second. If the writ of error shall not be dismissed for want of jurisdiction, Defendant in Error moves that the said judgment of the Supreme Court of the State of Mississippi be affirmed on the ground that although, in the opinion of this Court, the record may show that this Court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the questions on which the decision of the cause here depends are so frivolous as not to need further argument. (Rule 6, subdivision 5.)

M. F. HARRINGTON,
WILLIAM H. WATKINS,
*Attorneys for Defendant in Error
for the Purposes of These Motions.*

NOTICE OF MOTIONS.

To above named Plaintiffs in Error, and to Robert B. Mayes, Jackson, Mississippi, Attorney of Record for Plaintiffs in Error:

You, and each of you, are hereby notified that the Defendant in Error, in the above cause, will, on Monday October 2nd, 1916, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for consideration of the said Court, the foregoing motions, and each of them, and the brief thereon, including portions of the record hereto attached, and served upon you herewith.

M. F. HARRINGTON,
WILLIAM H. WATKINS,
*Attorneys for Defendant in Error
for the Purposes of These Motions.*

STATEMENT OF CASE.

This case is one for damages for personal injuries sustained by the Defendant in Error while in the employ of the Plaintiffs in Error, in Memphis, Tennessee, on March 15th, 1913.

On or about the 7th day of January, 1913, George R. Williams, the Defendant in Error in this case, who was then a young man of twenty-four years of age, entered the joint service of the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company as switchman in their yards in the City of Memphis, Tennessee. Williams was reared near Atchison, Nebraska, and prior to the injury for which suit was brought in this case was in excellent health.

Upon the 15th day of March, 1913, the Plaintiffs in Error assigned him to duties as night switchman in the south yards in Memphis, Tennessee. Both of said Plaintiffs in Error were then and at all times had been engaged in interstate commerce, the Illinois Central Railroad operating a line of railroad from Chicago, in the State of Illinois, to New Orleans, in the State of Louisiana, operating through the States of Illinois, Kentucky, Tennessee, Mississippi, and Louisiana; and the Yazoo & Mississippi Valley Railroad operating a line of railroad from Memphis, in the State of Tennessee to New Orleans, in the State of Louisiana, in and through the States of Tennessee, Mississippi, and Louisiana. The Plaintiffs in Error in their south yards in Memphis, Tennessee, had and maintained certain switch tracks upon which cars of various kinds were stored. The tracks were numbered 1 to 21, each inclusive, numbering from the east to the west. A plat of these tracks was made Exhibit "A" to the testimony of Defendant in Error, and a copy thereof will be found with the record hereto attached. Williams was assigned upon March 15th, 1913, to work with an engine crew, the duties of the crew being that of kicking cars into the various switch tracks numbered 1 to 21 hereinbefore referred to. These various tracks

led into what is known as the lead, and the duties assigned to him and the crew to which he belonged upon the night of March 15th, 1913, were to fill the tracks in question with cars as became necessary, and for that purpose it became the duty of Williams to make fast the cars at the south end of the switch or track. Unless this was done, when cars were kicked in on the switches they would run out on the lead and interfere with the movements of cars beyond the track. The switches and the lead were in constant use at the time in interstate commerce. When Williams and the crew with which he was engaged started to work they began on track No. 21, being the westmost track. There were standing at the south end of this track near the lead three gondolas and a box car for the purpose of making the cars on the end of the switch fast and to keep them from pushing out on to the lead, thereby interfering with the movements of cars passing over and along said lead, it became Williams' duty to go to the south end of track No. 21 and adjust the brake on the car so that the car would not move further south when other cars were kicked against it. For that purpose he walked south between tracks 20 and 21, went up the ladder on the car in question, shown to have been a car of the Illinois Central Railroad Company, No. 121704, then in use by the Plaintiffs in Error. When he got to the top of the car, he caught hold of the hand-hold or grab-iron on the top thereof, which, being defective and loose, gave way and he fell to the ground a distance of eighteen to twenty feet. He fell upon his back and suffered serious and permanent injuries from which he has never recovered and will never recover. He has never been able to walk without the use of braces, a cane or crutch since the day of his injury, and, according to the testimony in the case, is permanently injured.

See testimony—

John McGinnis, Printed Record, page 16;
Geo. R. Williams, Printed Record, page 33;
C. T. Earle, Printed Record, page 67.

He instituted suit in the Circuit Court of the First District of Hinds County, Mississippi, against the Plaintiffs in Error, and the trial resulted in a judgment in his favor of \$15, 000.00. The Plaintiffs in Error prosecuted an appeal to the Supreme Court of the State of Mississippi, which appeal was affirmed without written opinion, and from the judgment of the Supreme Court of the State of Mississippi, affirming the judgment in favor of Defendant in Error, this writ of error is prosecuted.

Neither during the trial in the case in the Circuit Court by the evidence, pleadings, or instructions, or in the motion for a new trial was there any suggestion upon the part of the Plaintiffs in Error that the Act of Congress, approved April 14th, 1910, was not in full force and effect; nor neither was there any pleadings of any kind or character filed by the Plaintiffs in Error in the case to the effect that the car in question was in use July 1st, 1911, or that it has not been rebuilt since said date, or that its equipment was more than three inches out of standard. The only plea filed and relied on by the Plaintiffs in Error was the plea of general issue indicated and shown in this record. (Printed Record, page 5.)

In this Court it is assigned as error:

First. The Supreme Court of Mississippi erred in deciding and holding that it was not error on the part of the Court of original jurisdiction to give in charge to the jury the following instruction, viz:

"INSTRUCTION No. 1. The Court instructs the jury for and on behalf of the plaintiff as follows: That under Section 2 of the Act of Congress, approved April 14, 1910, it became and was the duty of the defendant companies, on the 15th day of March, 1913 to equip their cars which they were using on their railroads, with proper hand-holds, and it was the express duty of the defendants, as to all cars having ladders upon them, to have secure hand-holds or grab-irons

on the roofs, at the top of such ladders, and a failure to have secure hand-holds on the roofs, at the top of such ladders was a violation of the Act of Congress which made the defendant companies liable in damage to any employee who was injured in consequence of the violation of this law, and who at the time of such injury was engaged in the line of duty to defendant. Now, therefore, if you believe from the evidence in this case that George R. Williams, plaintiff, in the line of his duty, went upon the car in question, in the yards of defendant, being used by them, and that by reason of a defective hand-hold at the top of said car, he fell and was injured, you will return a verdict in favor of the plaintiff."

And it so erred because the Act of Congress referred to did not require the equipment of the cars with hand-holds and grab-irons on the roof, as the instruction directed, for the reason that the Act of Congress referred to requiring this was not in force on the 15th day of March, as stated in the instruction.

Second. The Supreme Court of Mississippi further erred in deciding that it was not error on the part of the Court of original jurisdiction to give in charge to the jury the following instruction, viz:

"INSTRUCTION NO. 2. The Court further instructs the jury, for and on behalf of the plaintiff, as follows: That it is provided by Section 4 of the Act of April 14, 1910, and as applied to these defendant companies that if they move or haul, or handle with commercial cars, any car which has a ladder thereon, and which has not secure hand-holds on the roof at the top of such ladders, that such car is then used at the sole risk of the companies, and they are made absolutely liable in damages to any employee who is injured in the line of duty by reason of their failure to have a secure hand-hold; and you are therefore instructed that in such cases, the employee does not assume the risk of injury, but the risk is carried by the company."

Third. The Supreme Court of Mississippi further erred in deciding that it was not error on the part of the Court of original jurisdiction to give in charge to the jury the following instruction, viz:

"INSTRUCTION No. 4. The Court instructs the jury for the plaintiff that it was the absolute duty of the defendants to have and maintain a safe hand-hold at the top of the car in question, and a failure so to do was negligence on the part of the said companies as a matter of law." (Printed Record, 268.)

Statement as to Those Portions of the Record Printed and Appended Hereto.

No portion of Record printed herein, because Whole Record is now before the Court in printed form.

MOTION TO DISMISS.

This motion is based upon the claim, which, we respectfully submit, is patent, that the alleged Federal questions are wholly formal, are so devoid of merit as to be frivolous, and have been so explicitly foreclosed by the decisions of this Court as to leave no room for real controversy.

Mr. Taylor, in his work on Jurisdiction and Procedure in the United States Supreme Court, says (page 638):

"A writ of error from the Federal Supreme Court to the State Court, will be dismissed where the Federal question relied upon to confer such jurisdiction manifestly lacks all color of merit."

This Court said in the case of *Equitable Life Assurance Society vs. Brown*, 187 U. S. 308, 47 Law Ed. 190, as follows:

"But it is well settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real, substantive question on which the case may be made to turn; that is, a real and not merely formal Federal question is essential to the jurisdiction of this Court. Stated in another form, the doctrine thus declared is, that

although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for controversy, the motion to dismiss will prevail *New Orleans Water Works Co. vs. Louisiana*, 185 U. S. 336-345, and authorities there cited."

The same rule is announced in the following cases:
New York & N. E. Railroad Co. vs. Bristol, 151 U. S. 556, 38 Law. Ed., 269;
Southern Railroad Co. vs. Carson, 194 U. S., 136, 48 Law Ed., 907;
Louisville & Nashville R. R. Co. vs. Melton, 218 U. S. 36, 54 Law Ed., 921;
Easterling Lumber Co. vs. Pierce, 235 U. S. 380, 59 Law Ed., 279;
Erie Railroad Co. vs. Solomon, 237 U. S. 427, 57 Law Ed., 1033;
Manhattan Life Insurance Company vs. Cohen, 234 U. S. 123, 58 Law Ed., 1245.

This cause was tried in the Circuit Court of the First District of Hinds County, Mississippi, upon the sole question of law as to whether or not the plaintiffs in error were absolutely liable for the injury to the defendant in error and as to whether or not plaintiffs in error could show the exercise of reasonable care and diligence in defence of the action. This question has been so fully foreclosed by the numerous adjudications of this Court as to be regarded as frivolous.

It has been invariably held since the passage of the Act of 1893 and the amendments thereto, that the Acts imposed absolute duty upon the employer of making the equipment provided for in the statute absolutely safe; that under the statutes there was never presented any question of reasonable and ordinary care, lack of knowledge of the employer or reasonableness of inspection. In all cases it has been held only necessary

for the employee to show his employment, the use of the instrumentality, the injury as the result of defective equipment used in violation of these enactments. It would answer no good purpose to enter into a discussion of the various adjudications of this Court on that point. So far as the purpose of this argument is concerned it is sufficient to refer the attention of the Court to the latest case upon the subject: that of *Texas & Pacific Ry. Co. vs. Rigsby*, Advance Sheets, dated May 15, 1916, p. 482. That was a suit just like this one, brought for an injury which occurred September 4, 1912, under the amendment of the year 1910, on account of the failure of the Railroad Company to furnish a suitable and safe ladder at the side of the car. This Court, through Mr. Justice Pitney, used the following language:

"It is insisted that Rigsby was not within the protection of the Act because he was not coupling or uncoupling cars at the time he was injured. The reference is to Sec. 4, of the Act of March 2nd, 1893, which required 'secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. This action was not based upon that provision, however, but upon Section 2 of the Amendment of 1910, which declares: 'All cars must be equipped with secure sill steps and efficient hand-brakes, all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds, or grab-irons on their roofs at the top of such ladders.' There can be no question that a box car having a hand-brake operated from the roof requires also a secure ladder to enable the employee to safely ascend and descend, and that the provision quoted was intended for the special protection of employees engaged in duties such as that which plaintiff was performing."

It will be noted in the present case Defendant in Error was performing the identical duty that Rigsby

was engaged in. The Defendant in Error was going up the side of the car for the purpose of setting the brake in order that the car would stand fast. It was further insisted in the Rigsby case that Rigsby was not engaged in interstate commerce. It was shown, however, that the car was used by the railroad, which itself was engaged in interstate commerce, and on that point Mr. Justice Pitney said:

"If is earnestly insisted that Rigsby was not under the protection of the Safety Appliance Acts because, at the time he was injured, he was not engaged in interstate commerce. By Section 1, of the 1903 amendment its provisions and requirements, and those of the Act of 1893 were made to apply to 'all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith,' subject to an exception not now pertinent. And by Section 5 of the 1910 Amendment, the provisions of the previous Acts were made to apply to that Act with a qualification that does not affect the present case. In *Southern R. vs. U. S.* 222 U. S. 20, 56 L. Ed., 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A., 822, which was an action to recover penalties for a violation of the Acts with respect to cars some of which were moved in intrastate traffic and not in connection with any car or cars used in interstate commerce, upon a railroad which was a part of a through highway for interstate traffic, it was held that the 1903 Amendment enlarged the scope of the original Act so as to embrace all cars used on any railway that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not. The question whether the legislation as thus construed was within the power of Congress under the Commerce Clause was answered in the affirmative, the Court saying (page 27): 'Speaking only of railroads which are highways of both interstate and intrastate commerce,

these things are of common knowledge. Both classes of traffic are at times carried in the same car and when this is not the case, the cars in which they are carried are frequently communicable in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both, and the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are inter-dependent, for whatever brings delay or disaster to one or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any car of any train is a menace, not only to that train, but to others."

Now, in the present instance we have shown that the Defendant in Error was engaged in interstate commerce: in other words, that he was protecting a track or lead from being congested, which track or lead was then used in interstate commerce by keeping cars from running back on to it. The question as to whether or not the employee was engaged in interstate commerce is immaterial under this decision.

Again, it was contended in that case that no negligence was shown. In reference to that the Court said:

"It is argued that the statute does not apply except where the car is in use in transportation at the time of the injury to the employee, and that since it does not appear that the car in question was in bad order, because of any negligence on the part of the railway company, and it was being taken to the shop for repairs at the time of the accident, there is no liability for injuries to an employee who had

notice of its bad condition, and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in the *Great Northern R. Co. vs. Otos*, 239 U. S., 349, 351, ante, 124, 36 Sup. Ct. Rep. 124, where it was pointed out that although Sec. 4 of the Act of 1910 relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment. The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition."

"*St. Louis I. M. & S. R. R. Co. vs. Taylor*, 210 U. S. 281, 294, 295, 52 L. Ed., 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep., 464; *Chicago B. & Q. R. Co. vs. United States*, 220 U. S. 559, 575, 55 L. Ed. 582, 31 Sup. Ct. Rep., 612; *Delk vs. St. Louis V. S. F. R. Co.* 220, U. S. 580, 586, 55 L. Ed., 590, 595, 31 Sup. Ct. Rep. 617.

"Of course, the employee's knowledge of a defect does not bar his suit, for by Sec. 8, of the Act of 1893, an employee injured by any car in use contrary to the provisions of the Act is not to be deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge; and by Sec. 5 of the Act of 1910, the provision of the 1893 Act are made applicable to it, with a qualification that does not affect remedial action by employees.

"The Circuit Court of Appeals correctly disposed of the case, and its judgment is affirmed."

It will be unnecessary, therefore, for us to review the large number of cases referred to by this Court; and from this case three rules are drawn:

(a) That the amendment of 1910 under which this suit is brought was enacted for the benefit and referred to an employee going up a ladder for the purpose of using a hand brake on a car;

(b) That neither the employee nor the car need be engaged in interstate commerce, it only being necessary that the carrier itself be engaged in interstate commerce;

(c) The question as to whether or not the defective condition of the equipment was due to the negligence of the carrier or not was not material since the statute imposed an unqualified duty to maintain the equipment in secure condition.

The Act of 1910 in Effect July 1, 1911.

It is contended by the attorney for the plaintiffs in error in this case, however, that upon March 15, 1913, the Safety Appliance Act of 1910 was not in effect, it being the contention that the Act did not go into effect until the first of July, 1916. In our brief on the merits in this case, we have fully discussed the question as to when the Act of April 14, 1910, went into effect. We think we have demonstrated therein that the contention of plaintiffs in error in respect thereto is frivolous, and we now make reference to the argument therein contained. We do not deem it necessary to repeat the same here. We have gathered in our brief on the merits all the authorities throwing light upon the assignments of error of plaintiffs in error touching the question as to when the Act of April 14, 1910, went into effect.

MOTION TO AFFIRM.

We respectfully submit that it is apparent that the writ of error in this case was taken solely for delay, and that the questions presented by the assignments of error have been foreclosed by previous decisions of this Court, and are so frivolous as to need no further argument, for the reason that:

(a) The Safety Appliance Act in question imposed an absolute duty upon the plaintiffs in error to maintain the ladder and hand-holds at the top of the car in safe condition.

(b) The Act of March, 1910, providing for ladders at the sides of cars and hand-holds at the top thereof, according to its express provisions, went into effect July 1, 1911.

(c) That even if it should be true that the Interstate Commerce Commission had authority to suspend the Act as to cars in use July 1, 1911, which had not since been rebuilt, or where the standard was more than three inches from that required by the Interstate Commerce Commission, the plaintiff in error did not make the point in the trial court, where the same might have been met by the defendant in error, and has not by any kind of pleading and proof sought to bring itself within the immunity in which it now seeks to take refuge.

We, therefore, respectfully invoke the present Subdivision 5 of Rule 6:

"The Court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motion as is provided for in cases of motions to dismiss under Paragraph 4, of this rule."

If jurisdiction is maintained, we invoke the rule announced by the *Mo. Pac. Ry. Co. vs. Castle*, 224 U. S., 511, wherein Chief Justice White said:

"Defendant in error moves to affirm the judgment under Subdivision 5 of Rule 6. The motion we think should prevail, since the questions urged upon our attention as a basis for reversal of the judgment have been so plainly foreclosed by decisions of this Court as to make further argument unnecessary."

We also respectfully invoke the doctrine announced in *Deming vs. Carlisle Packing Co.*, 226 U. S., 102, through Chief Justice White, that, as the:

"Conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this Court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results."

We call the Court's attention to the following cases where, under the above rule, damages were allowed:

Prentice v. Pickersgill, 6 Wal., 511, where 10 per cent was allowed.

Barrow vs. Hill, 13 Howard 54, where 10 per cent. was allowed;

Tex. & Pac. R. R. Co. vs. Volk, 151 U. S., 73, where 10 per cent. was allowed;

Deming vs. Carlisle Packing Co., 226 U. S. 102, where 5 per cent. was allowed;

Southern Ry. Co. vs. Gadd, 233 U. S., 572, where 5 per cent. was allowed;

We, therefore, respectfully request that interest and 10 per cent. damages be allowed, as authorized by Subdivision 2, of Rule 23.

Respectfully submitted,

WILLIAM H. WATKINS,

Attorney for Defendant in Error.

WATKINS & WATKINS,

M. F. HARRINGTON,

Of Counsel.

IN THE
SUPREME COURT OF THE UNITED
STATES

No. No 637

ILLINOIS CENTRAL RAILROAD COMPANY
AND THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY, PLAINTIFF IN
ERROR,

VS.

GEORGE R. WILLIAMS, DEFENDANT IN
ERROR.

BRIEF OF DEFENDANT IN ERROR ON MOTION
TO AFFIRM.

Mays, Wells May and Sanders, of Jackson, Missis-
sippi, Attorneys for Plaintiff in Error.

Watkins and Watkins of Jackson, Mississippi,
M. F. Harrington, O'Neill, Nebraska, Attorneys
for Defendant in Error.

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IN THE
SUPREME COURT OF THE UNITED
STATES

No.

ILLINIOS CENTRAL RAILROAD COMPANY
AND THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY, PLAINTIFFS IN
ERROR,

VS.

GEORGE R. WILLIAMS, DEFENDANT IN
ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN
ERROR ON MOTION TO AFFIRM.

THE PLEADINGS.

Appellee brought this action to the Circuit Court of the First District of Hinds County, against the appellants, for certain personal injuries sustained by him while employed by appellants at Memphis, Tennessee, on the 15th of March, 1913. The declaration

stated a cause of action under the Safety Appliance Laws, passed by Congress.

The pleadings and evidence in this case make out a cause of action under the Safety Appliance Laws. They would make out a cause of action under Section 4 of the Act of 1893. They clearly, unmistakably, make out a cause of action under Section 2 of the Act of April 14, 1910.

II.

The first Safety Appliance Act, throwing any light on the question here, was the Act of Congress approved March 2nd, 1893. At that time, it was known that there was a terrific loss of life and limb on American railroads, and Congress determined to do what it could to put a stop to this, and accordingly they adopted this first Safety Appliance Act. The Act covered more than hand-holds or grab irons. It covered certain equipments for engines and it covered automatic couplers or couplers which were coupled by impact. By Section 4 of the Act now being discussed, it is provided:

"From and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand-holds in the ends and sides of each car, for greater security to men in coupling and uncoupling cars."

The railroads proceeded to comply with this Act

of Congress and the uniform action by the railroads themselves is the very best evidence against them as to the true construction of the Act. They proceeded to comply with this law by putting at two corners of each car, certain hand-holds or grab irons, a short ways from the corner and also on the roof. All these grab irons are, properly speaking, **at the end of the car**. The set going up on the side might be called "side grab irons" and those up on the end of the car, "end grab irons," but all of these, as well as the grab irons or hand-holds on the roof, are hand-holds or grab irons **at the end of the car**. **The grab iron on the roof is the most essential of all the grab irons**, for the safety of all men engaged in coupling and uncoupling cars. The coupler law of course, requires that the men can couple and uncouple the cars by impact, without going between the cars, but there are other duties which the men have necessarily to perform. In order to couple cars when detached from a locomotive and frequently in order to uncouple them, it is essential to have a hand brake on the car. When a car is loose from the engine and moving and it is desired to couple it to another car by impact, a brakeman must get on top of the car and control its movements by the use of the hand brake. Congress therefore wisely provided that they should equip these cars with hand-holds or grab irons, for the greater security of the men engaged in coupling and uncoupling cars.

I wish the Court now clearly to understand that at present I am discussing hand-holds and grab irons

and I am not discussing ladders. It is because the safety appliance known as a ladder was not covered by the Act of 1893. Ladders were practically unknown on railroad cars at that time, although now in very common use. The method to be adopted by a railroad employe in 1893 in getting up to the wheel of the brake in either the coupling or uncoupling of cars, was to go up with the assistance of the grab irons at the corner of the car and the grab irons or hand-holds on the roof. The most essential of all these grab irons for the safety of the men in getting up to the brake wheel and down from it again, was the grab iron or hand-holds on the roof. The companies, complying with the Act of Congress, equipped the cars with grab irons at the corners and on the roof. The grab iron on the roof was sometimes one piece of metal diagonally across the corner. Sometimes two grab irons were used, one running parallel with the end of the car, and one parallel with the side of the car. In some instances, they had a right angle grab iron. But all railroads recognized that of all the grab irons, the most essential was the one on the roof of the car, because there was where the greatest danger was, in going up or down. That will be true under any circumstances and it will be particularly true on occasions of wind storms, snow, ice or sleet on the roof of the car. We have never heard that any railroad company disputed this to be the meaning of the law in any appellate Court, except one. They did have the hardihood to present to the Texas Civil Court of Appeals the question whether

the hand-hold on the roof was covered by Section 4 of the Act of 1893. I credit to the counsel who presented such an idea, the charitable presumption that he had never gone on top of a railroad car to set a brake or release it, or he would never have made the ridiculous claim that you had to have hand-holds both ways from the corner of the car for the security of the brakeman, but that you needed no hand-hold at all at the most dangerous place of all, "the roof." The case to which I refer is:

M. K. & T. Ry. Co., vs Barrington 173 S. W. 595.

The Texas Court, which is the only appellate tribunal that has ever had to meet the question in this country, promptly disposed of the railroad's contention in the following language.

'The train upon which appellee was at work at the time hereceivedtheinjuriescomplainedof was engaged in interstate commerce, but we think it quite clear that the alleged defective appliance which caused his injuries was covered by the federal statute, enacted for the safety of employes in 1893, amended in 1896 and 1908, and known as the Safety Appliance Act. The case is not therefore one arising under the federal Employer's Liability Act (Act April 22, 1908, C. 149 35 Stat. 65 (U. S. Comp. St. 1913, P.8657), in which the comon-law rule with respect to the assumption or risk applies. This being true, there was no issue of assumed risk in the case, and the peremptory instruction was properly refused. The Safety Appliance Act referred to above provides that it shall be unlawful for any rail-

road company to use any car in interstate commerce that is not provided with secure grab-irons or handholds, and declares that any employe injured on any car in use, contrary to the provisions of the act, shall be deemed to have assumed the risk, although he had full knowledge thereof. In construing this statute, the Supreme Court of the United States, the Court of Civil Appeals for the Fourth District of Texas, and this Court held that it makes it the absolute duty of railway companies to have the cars in use by them equipped with secure handholds, regardless of the question of reasonable care to have and keep them secure, and that, where an injury to an employe happens from an insecure hand-hold, said statute denied to the employer the defense of assumed risk. *Railway Co. vs. Kurts* 147 S. W. 658; *Railway Co. vs. Plemmons*, 171 S. W. 259; *Delk vs. St. Louis & S. F. Ry. Co.* 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; *Railway Co. vs. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582. In the first case cited it is held that railway companies under said statute, are required to do all things that are possible to have and maintain on the cars in use by them secure handholds, 'even if they have for that purpose to keep inspectors on every train they move.' Applying these rules in the present case, which we think must be done, it is clear that the Court would have erred if it had taken the case from the jury and directed a verdict for the appellant. **The fact that the handhold in question was on the top of the car and not on the side or end thereof is unimportant.** It was a necessary appliance for the safety of the railway company's employes in performing the duties required of them, and is clearly included in the statute. Furthermore, we find that at the time appellee was hurt he

was climbing up to the top of the car on a ladder, and that by Act of Congress, passed April 14, 1910, to supplement an act to promote the safety of employes, etc. (U. S. Comp. Stat. 1901, Supp. 1911, P. 2 p. 132), it is provided, among other things, that:

'All cars having ladders shall also be equipped with secure hand-holds or grab irons on their roofs at the top of such ladders.'

Nor does the fact that the car in question was a 'foreign car' alter the case. The Safety Appliance Act, as we understand, apply to any car in use by the carrier."

Two Circuit Courts of Appeals have had to determine in criminal actions whether the Act of April 14, 1910, was in force and they have both held that it was in force. Again we have a case where the railroad attorneys stand on one side claiming the law and we have the unanimous opinion of two different Circuit Court of Appeals that the law is the way we claim. The criminal cases to which we refer and which we invite the Court to read as holding flat-footed that the law is as we say it is in this case are as follows:

U. S. vs. Trinity & B. V. Ry. Co. 211 Fed. 448.

U. S. vs. Great Northern Ry. Co. 229 Fed. 927.

The Act of 1893, requiring these grab irons on the sides and ends of the cars, including of course, the grab iron on the roof, applied only to cars which were being used in interstate commerce. A railroad

engaged in interstate commerce, could use in its intrastate commerce, a car not equipped, as required by Section 4. This condition continued until 1903, when Congress drew the line a little tighter and by Section 1 of the Act, approved March 2nd, 1903, it Act of March 2nd, 1893, should "be held to apply to was provided that all the appliances required by the all trains, locomotives, tenders, cars, and similar vehicles, **used on any railroad engaged in interstate commerce.**" So that, by the Act of 1903, the railroads were required to have these hand-holds or grab irons on all cars which they used. The only requirement was that the railroad itself should be engaged in interstate commerce. If so, then it was guilty criminally and liable civilly, if it used any car without proper grab irons and hand-holds on a car engaged in interstate commerce or in intrastate commerce.

III.

Congress realized that further legislation was necessary. From the time the Act of 1893 was adopted, up to 1910, there had been much change in railroad cars. Particularly, had refrigerator cars come into very general use. On this class of cars, running boards are very essential on the roof. They are on any kind of a box car, but more so on refrigerator cars, where ice has to be moved about, as during those years, from 1893 on, an enormous business had been developed in the shipment of dressed meats from the great packing centers and in the shipment of strawberries, fruits and vegetables

from the southern states to the north and from California to the east. Cars had become much longer and of greater capacity and Congress determined to do some additional legislating. They determined not only to require additional appliances, but they determined to have these appliances **standardized** or made uniform, within a reasonable time. From the outset, they had been trying to get uniform couplers. It was found that with so many different kinds of couplers, the couplers did not always work well and subjected the employe and the public to unnecessary hazards. So Congress determined that the safety of the employe and of the shipping and traveling public, required additional safety appliances and furthermore, required the standardization of railroad equipment. Accordingly, Congress passed the Act approved April 14, 1910, which is the Act under which this action was prosecuted to judgment, although the liability of the company is undisputed even if we were tested by the Act of 1893. In order to get a clear view of this Act, let us consider what appliances were required by the Act of 1893. Here they are:

1. Equipping locomotive engines, engaged in interstate traffic with a power drive wheel brake, so as to operate what is known as the "train brake system."
2. Requiring them to equip their cars with automatic couplers, which would couple by impact.
3. Requiring them to have hand-holds and grab

irons on their cars for the greater security of the men.

These appliances, and these alone were required by the Act of 1893. But certain additional appliances were required by the Act of 1910. By Section 2 of the Act of 1910, it is provided as follows:

"SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used in its line any car, subject to the provisions of this Act not equipped with appliances provided for in this act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards, shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds or grab irons on their roofs at the tops of such ladders; provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars, while they are thus combined for such purpose."

What are the additional requirements of the Act of 1910?

1. They must equip their cars with secure sill steps. That was not required by Congress up to that time.
2. They must equip their cars with efficient hand brakes. That was not required by Congress up to that time.
3. All cars requiring secure ladders, must be

equipped with such **ladders**. Congress had never mentioned a ladder up to April 14th, 1910. But box cars, and stock cars and other special cars were gradually being equipped with ladders and Congress knew this.

5. They must equip their cars with secure running boards. Congress had never before legislated on running boards.

6. All cars having ladders must be equipped with secure hand-holds or grab irons on the roof and the **top of such ladders**. Congress had never before required a grab iron at the top of a ladder, for the good and sufficient reason that Congress had never required a ladder. They were required to have hand-holds or grab irons to work in connection with the grab iron or hand-hold at the corner. But up to April 14th, 1910, no hand-hold was required at the top of a ladder on the roof, because Congress had never legislated on ladders. The ladder was a newer appliance which had come into considerable use, and Congress took notice of it and legislated as to it. This action just referred to, gave the carriers about fourteen and one-half months to get on this equipment, if it did not have it on already. But this Section 2, absolutely requires them to have on every car, by July 1st, 1911, the equipment required by Section 2. Congress never authorized the Interstate Commerce Commission to suspend Section 2. Furthermore, the Interstate Commerce Commission has never attempted to suspend Section 2. The con-

tention of the railroad company in this case is that Section 2 was suspended. We cannot understand why such a statement is made. Surely, it must be through oversight. There is not a single line or a word in the Act of Congress, authorizing the Commission to suspend Section 2. Congress itself provided when the railroads must comply with Section 2. Congress itself said when the railroads must have efficient hand brakes, secure running boards, secure ladders and hand-holds, in line with these ladders and not diagonally, and they must have hand brakes. Congress was reasonable. Congress gave them nearly fifteen months to comply with its requirements, but it gave no longer and it did not authorize the Interstate Commerce Commission to give them any more and the Interstate Commerce Commission has never attempted to give them even an hour after July 1st, 1911, within which to comply with Section 2. The Interstate Commerce Commission was given authority to suspend Section 3. It did suspend Section 3 until July 1st, 1916, as to certain cars, but Section 3 has absolutely nothing to do with the requirements of Section 2. It never attempted to suspend Section 2. This will all be apparent not only from a reading of the acts, but from a reading of the two orders of the Interstate Commerce Commission made on March 13th, 1911. This Act that I am now discussing contains Section 3, which is as follows:

“SEC. 3. That within six months from the passage of this act the Interstate Commerce

Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers, subject to the provisions of this act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after hearing and for good cause shown, and failure to comply with any such requirement of the Interstate Commerce Commission, to be made after full hearing, and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or

vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission."

The Court will observe that this section does not authorize the commission to suspend Section 2. It merely provides for uniformity or standardization of railroad equipment. It provides for the standardization of the sill steps, the hand brakes, the ladders, the running boards and hand-holds, covered by Section 2 just mentioned, but Section 3 authorized the standardization of more than that. It also authorized the Commission to **standardize the draw bars**. Then, furthermore, as showing the plain meaning of it, Congress further provided by Section 4 of the Act, as follows:

"SEC. 4. That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: Provided, That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available

point where such car can be repaired, without liability for the penalties imposed by section four of this act or section six of the act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

Not content with that, and determined to protect the men employed on these railroads, Congress provided in Section 5, as follows:

"SEC. 5. That except that, within the limits specified in the preceeding section of this act, the movement of a car with **defective or insecure equipment** may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful."

I direct the Court's attention specifically to the

following language contained in Section 4 and which is applicable to these damage cases brought by employes. Here is what Congress says:

“Nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe by reason of or in connection with the movement or handling of such car with **equipment that is defective or insecure**, or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to.”

The Acts referred to were those of 1893 and 1903 and the amendment of 1896, which is not material here. So that Congress said that they should be liable in damages if they hauled any car which was not equipped in accordance with the requirements of the Act of April 14th, 1910, March 2nd, 1903 or March 2nd, 1893, or regardless of these Acts, it was made unlawful and they were made liable in damages if they hauled **any car “with equipment which is defective or insecure.”**

Can the human mind express more clearly the liability of a railroad company for hauling cars with defective appliances? Counsel admit that if Section 2 was not suspended, they are hopelessly wrong. Where do they ever get the idea that Section 2 was suspended? The words “this section” occur only in Section 3 and which section authorized the Interstate Commerce Commission to make standards for the safety appliances required by Section 2 **and other appliances**, particularly the **draw bars**.

IV.

By Section 2, Congress is requiring the railroads to equip, if they had not already done so, their cars with sill steps, hand brakes, running boards and ladders with hand-holds, right above the ladder in all cases where ladders were necessary. The cars on which ladders should be put, was necessarily left to the railroad company, unless specific orders were given by the Interstate Commerce Commission, but until the Interstate Commerce Commission should prescribe some standard, the railroads could go on running their cars with the regular hand-holds or grab irons in the corners and on the roof, or they could have ladders with grab irons above the ladders if they preferred. But an equipment of either kind would satisfy Section 2 of the Act of 1910. In other words, they either had to equip them according to Section 4 of the Act of 1893 as to hand-holds and grab irons or according to Section 2 of the Act of 1910, as to ladders and grab irons. This is the construction placed on the Act itself by the railroads and is manifestly right until such time at least as a different standard was prescribed by the Interstate Commerce Commission.

Let us take the case of running boards. Congress said, in substance by Section 2 of the Act of April 14th, 1910, to its railroads:

"You must have secure running boards on all cars that require running boards."

They were not required to have running boards on flat cars or gondolas. But all box cars and refrigerator cars must have secure running boards. Congress did not prescribe any standard. The railroads at that time had their cars equipped very generally with running boards. But very often, they were nailed down instead of bolted. These running boards were ten and twelve inches wide and the writer has seen them as narrow as eight inches. But if they had such running boards and they were secure by July 1st, 1911, then the railroads were complying with the law. No standard of running boards was fixed by Congress, but by July 1st, 1911, every railroad company must have secure running boards on every car requiring a running board. They were not required to have a standard or uniform running board, but it must be a secure running board. When the Interstate Commerce Commission came to enforce Section 3 mentioned, as to standardization, they prescribed a different kind of running board. For the convenience of the Court, I am printing and appending to this brief as Exhibit A, part of the first order made by the Interstate Commerce Commission on the 13th day of March, 1911. The second order, I am appending as Exhibit B. On page three of Exhibit A, you will find the standard of running boards prescribed by the Interstate Commerce Commission. Here is what they say:

“Longitudinal running boards shall be not less than eighteen, preferably twenty inches in width.”

On the 13th day of March, 1911, the Commission by virtue of the power vested in it by Section 3 of the Act of April 14th, 1910, prescribed a standard running board which must not be less than eighteen inches wide. On the same day and under the order Exhibit B, they gave them until July 1st, 1916, in which to put on the eighteen inch wide running boards, unless the car was reshopped before that time. Counsel for the railroad company very ingeniously refrained from giving the Mississippi Court any light as to this all important order, Exhibit A, which shows conclusively that the Interstate Commerce Commission well knew that it had no authority to suspend Section 2 and all its authority was confined to Section 3, which authorized it to standardize the equipment named in Section 2, and **also authorized it to standardize equipment not mentioned therein.** The Interstate Commerce Commission makes it perfectly plain that they never intended to relieve them of the duty of having ladders where ladders were required and hand-holds on the roof, running parallel with these ladders, for the Commission provided, as shown by page seven of Exhibit A, as follows, as to the hand-holds on the roof of the car:

"One parallel to treads of each ladder, not less than eight nor more than fifteen inches from the edge of the roof, except on refrigerator cars, where ice hatches prevent, or location may be near edge of roof."

That was the standard prescribed by the order of Exhibit A made on March 13th, 1911, and they

were given until July 1st, 1916, in which to change their hand-holds, provided they were not, on the existing cars, too far out of place. By the order, Exhibit B, made at the same time, and as shown by Paragraph G thereof, the Interstate Commerce Commission provided as follows:

"Carriers are not required to change the location of hand-holds (except end hand-holds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when the cars undergo regular repairs they must then be made to comply with the standards prescribed in said order."

The Court will therefore see that the Commission prescribed standards, but it did give them until July 1st, 1916, to comply on all their cars. If the hand-holds were within three inches of the standard required by the commission, then they might leave these hand-holds where they were, without changing them, until July 1st, 1916, or until the car was re-shopped, but if the hand-hold was more than three inches from where the standard required it to be, then they did not have until July 1st, 1916, in which to make the change. The Commission speaks of changes. Now, let us take the case of a hand-hold at the top of a ladder. The Commission said that the hand-hold might not be less than eight inches from the edge of the roof, not more than fifteen inches. That is the standard. But they did not have to change it to the standard, if the hand-hold already

at the top of the ladder was within three inches of the standard required. For example, if they had a car where the hand-hold at the top of the ladder was seven inches from the edge of the roof, they did not have to make any change until July 1st, 1916, provided it was a secure hand-hold. If it was six inches from the edge of the roof, no change was required. If it was five inches from the edge of the roof, no change was required. But if the hand-hold was within four inches of the edge of the roof, they had to change it to the standard required by the Commission. The Commission said it might be as far away from the edge of the roof as fifteen inches. Under the order, Exhibit B, made the same date, if sixteen inches from the eaves, they need not make the change immediately. If it was seventeen inches, they need not change. If it was eighteen inches, they need not change, but if it was nineteen or twenty or twenty-two or twenty-four inches from the eaves, then they must make the change at once. In view of these specific orders of the Commission, why are counsel justified in making any claim that the railroad has not violated the Act of Congress on which we rely?

V.

Let us calmly consider what the argument of these railroad attorneys means. They say that Section 2 was suspended, although Congress never authorized its suspension and although the Interstate Commerce Commission never attempted to suspend

it, and only suspended the time within which they should equip their cars with the standard appliances prescribed by the Commission. If these railroad attorneys are right, then until July 1st, 1916, they could start out their trains, made of box cars, equipped like this:

Without a sill step on them, without a ladder on them, without a grab iron or hand-hold on the roof, without a running board on them and without a hand brake on them. Can this Court imagine a train of box cars without a hand-hold or grab iron on the roof, without a sill step, without a ladder, without a running board and without hand brakes? How could they couple and uncouple cars when detached from the engine, without a hand brake? How could they do the enormous work of switching, without hand brakes? How could they control the train if the air hose broke? How could they control the train if there was any trouble in the air line? A railroad train made up of box cars, without grab irons, hand-holds, brakes, running boards or sill steps, would be a fitting sight for Gods and men. And yet these counsel gravely urge such an absurd proposition on the highest Court in the Republic.

This Court recently dealt with the liability of a railroad company for failure to have a secure hand-hold.

Texas & Pacific R. R. Co. vs. Rigsby, —U. S.

That case was prosecuted under Section 2 of the Act of April 14th, 1910, just as we have prosecuted this case. That case was a **ladder** case also. **This is a ladder case.** I have pointed out to the Court already that the hand-holds and grab irons by which the men should get up to the brake wheel and down from it with safety in coupling and uncoupling cars, was covered by the Act of 1893 and that that Act could be complied with by having two hand-holds on the roof, one towards the side and the other towards the end of the car, or with a diagonal hand-hold. But a diagonal hand-hold would not comply with the requirements of Section 2, under which this action is prosecuted. Congress very wisely provided that where there was a ladder which was used as the means of getting up and down, instead of using hand-holds or grab irons, then they must have suitable and secure grab irons at the top of the ladder. It would not do in the judgment of Congress, to have simply something diagonal across the corner. When men went up a ladder, Congress deemed it prudent that the hand-hold should be right on the roof, above and in line with the ladder. The car from which Williams, the appellee herein fell, was a car which the Illinois Central had equipped with a ladder on the side and a hand-hold on the roof, as the means of getting up and down on that car. They could have complied with the Act of Congress by having had hand-holds on it, but the company deemed this car to be equipped with a ladder and hand-hold on the roof, so that this is, strictly a

ladder case. It was not one of the rungs on the side of the car that gave way, but the hand-hold at the top of the ladder, as covered by Section 2 referred to, just the same as the rungs on the side. They are all in the very same sentence.

VI.

From the time the Act of 1893 went into effect all railroads were required to have secure grab irons or hand-holds that the men could use in the operation of the trains and in switching. At the time That Act was passed there was scarcely any ladders—the writers believes none—in use on railroad cars. Every railroad construed the Act of 1893 to mean that where hand-holds were put at both corners of a car there must be some kind of a hand-hold on the roof. The fact that every railroad in the United States construed the statute in that way is practically conclusive against the railroads. The Government has likewise treated the law in the same way.

But since 1893 there has been much change in the equipment of cars. If you go today into railroad yards in any terminal you will find ladders on a very large number of cars. Some of these will be ordinary box cars, some automobile cars, some stock cars and some refrigerator cars. These ladders differ from the old-time hand-holds that men used in ascending and decending in their work as brakemen. These ladders are not all alike. But in substance they are all made in a ways similar to the ladders

that we have all climbed when boys. To constitute a ladder there must be not only the rounds but there should be two side pieces. These ladders are safer for the men than the common hand-holds. The sides protect the brakeman in case that his foot slipped on the round of the ladder. If it slipped either way the sides keep it from slipping off and may save him from falling. For this reason many railroads adopted the ladders instead of the common hand-holds.

Now the Act of 1910 does not require the railroads to put ladders on all their cars. They could follow up the former method of using hand-holds or grab irons. In a majority of cases they are still using grab irons or hand-holds and that is a compliance with the Acts of Congress. Indeed there are many cars that they could not use a ladder very well on. Nobody ever saw a ladder on a gondola car. But Congress by Section 2 of the Act of 1910 said to every railroad company that where a ladder was required they must have secure ladders and also hand-holds at the top of the ladder. It left it to the railroads to see on what cars ladders should be put but it said to the railroads that when they put ladders on they must be secure ladders and have hand-holds at the top of the ladders.

In the case at bar the Illinois Central Railroad Company had elected to equip its car with a ladder. The undisputed evidence here shows that this car was equipped with a ladder and Williams had hold of an insecure hand-hold on the roof. But the point I

want to make clear is that it is undisputed here that this car was equipped with a ladder and being so equipped, Section 2 required absolutely that the ladder should be safe and that there should be a secure hand-hold at the top of the ladder. That provision was never suspended. Congress never authorized the Interstate Commerce Commission to suspend that section of the Act for even a single hour after July 1st, 1911. And furthermore the Interstate Commerce Commission never attempted to suspend this Section 2. We need not go into the question here as to whether the Interstate Commerce Commission has under certain conditions power to suspend the operation of an Act of Congress. Congress never authorized the Commission to suspend Section 2. The Commission never attempted to suspend Section 2. Congress did authorize the Commission under Section 3 to give the railroads time in which to provide standard or uniform equipment. In Exhibits "A" and "B" hereto attached will be found portions of the orders made and which show clearly that the Interstate Commerce Commission construed the Act just as we construe it. No attempt was made to authorize a railroad company to run a car without a ladder, without a grab iron, without a hand-hold, without a sill-step, without a handbrake and without a running board. But Congress realized that uniformity was highly desirable in the interest of safety and the Commission has accordingly provided standards with which the railroad companies are to comply. For example: A brakeman working in the dark ought

to know whether the car that he is ascending has a hand-hold that is simply diagonal across the corner or whether there is a hand-hold running parallel with the side of the car and another running parallel with the end of the car. It is not material whether these two hand-holds are made out of one piece of iron at right angles to each other or whether they are made out of separate pieces of iron. Such a hand-hold is much safer than a diagonal piece of iron just across the corner of the car. The Interstate Commerce Commission has required all cars now to be equipped with hand-holds running parallel with the side of the car and the end of the car. No longer are they permitted to use a diagonal and this for the good and sufficient reason that the diagonal is not so safe. For example: A brakeman is coming down from a brake wheel. If it is snowing, or is icy or sleeting and you have only a diagonal piece of iron, when his foot is placed against the diagonal piece of metal there is greater danger that he will slip and fall than if you have a piece of metal that he can rest his foot against and running parallel with the side of the car. It is for this and other reasons that Congress authorized the Commission to standardize the equipment and it is for these reasons the Commission has standardized by the orders referred to in Exhibits "A" and "B."

VII.

In conclusion I submit that these railroad companies are wrong whether the right of Williams be

tested under the Act of 1893 as amended in 1903 or under the Act of 1910. The Act of 1893 required secure grab irons to be used by the men in coupling and uncoupling cars. The switching of a car is a part of the work of coupling and uncoupling quite often. Cars are coupled and uncoupled in the act of switching and it is absolutely essential to have a hand-hold on the roof. Did any member of this Court ever see a car with hand-holds at the corners of the car and no hand-hold on the roof? Did this Court ever see a car where a man didn't have a hand-hold between the brake wheel and the corner of the car where he had to get down? How could a man get from the brake-wheel down the side of the car unless there was a hand-hold on the roof? The absence of such a hand-hold would mean the slaughter of employes, and every railroad in the United States has construed the Act of 1893 as I am construing it. Everyone of them has hand-holds on the roof of the cars. So that if we were to rely on the Act of 1893 the judgment herein is right. And if it is under Section 2 of the Act of 1910 we are equally right. For that section positively requires every railroad company which equipped its cars with ladders instead of ordinary hand-holds to have them secure and in addition to the ladders to have a hand-hold on the roof. Even if the Commission had been authorized to suspend and had suspended Section 2 it would not help these railroad companies any in this case. The most they could claim then would be that they had five years in which to put on the ladders and the hand-holds.

But if they put the ladders and the hand-holds on sooner, then even under the order of the Commission they must be safe, of course. Could anybody contend that a railroad company before the five years expired could put an unsafe ladder and loose hand-hold on? This Court will indulge in no such absurdity. When ever the railroad company elects to put a ladder and a hand-hold on a car they must put it on safely and if it fails to do so it is liable civilly and criminally. There is no authority in the Acts of 1893, 1903, 1910 or in any order of the Interstate Commerce Commission to put on an insecure hand-hold or to maintain one.

In the opinion of the writer there is no merit whatever in the contention of the plaintiffs in error. These companies never had any defense in this action except as to the amount of damages. On the evidence in this case it was shown beyond question that they were liable civilly in this action and should have been prosecuted criminally by the government. They were entitled to defend as to the amount of damages and were afforded ample opportunity to make that defense and did so make it. But the damages have been settled by a jury, by the trial Court and the Supreme Court of Mississippi, and of course the amount of these damages is a question with which this Court is not concerned. I admit that if an instruction had been given in this case prescribing a wrong rule as to the measure of damages under an act of Congress that this Court could review the case and reverse it for the giving of a wrong instruction. But no

claim is made here and none was made in the Supreme Court of Mississippi that the instruction on damages in this case was wrong. The instruction of the trial Court on damages was drawn right along the main beaten paths. When a case has thus been tried and both parties have had a full and fair hearing, the writer believes it to be wholly unjustifiable for these companies, because of their financial ability so to do, to harass and annoy one of their employees who, without fault of his own, has sustained serious injuries and is awarded only a just and lawful verdict.

Respectfully submitted,

MICHAEL F. HARRINGTON,
Attorney for Defendant in Error.

EXHIBIT A.

This Contains All Parts of Standardization Order
Useful in the Williams' Case.

Order of the Interstate Commerce Commission,
March 13, 1911.

In Re Designating the Number, Dimensions, Location,
and Manner of Application of Certain
Safety Appliances.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drivingwheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment

to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act: **Provided**, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively; and February 27th, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said section three of said act, and superseding the Commission's order of October 13, 1910, relative thereto

It is ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the Act of April 14, 1910, and section four of the act of March 2, 1893, shall be as follows:

BOX AND OTHER HOUSE CARS.

Hand-Brakes.

Number: Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

Dimensions: The brake-shaft shall be not less than one and one-fourth ($1\frac{1}{4}$) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16), inches in diameter, of malleable iron, wrought iron or steel.

Location: The hand-brake shall be so located that it can be safely operated while car is in motion.

Running Boards.

Number: One (1) longitudinal running board.

On outside-metal-roof cars two (2) latitudinal extensions.

Dimensions: Longitudinal running boards shall be not less than eighteen (18), preferably twenty (20), inches in width.

Latitudinal extensions shall be not less than twenty-four (24) inches in width.

Location: Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to ladder locations, except on refrigerator cars where such latitudinal extensions can not be applied on account of ice hatches.

Manner of Application: Running-boards shall be continuous from end to end and not cut or hinged at any point: **Provided**, That the length and width of running-boards may be made up of a number of pieces securely fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with the end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill; and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial metal braces.

Running-boards shall be made of wood and securely fastened to car.

Sill-Steps.

Number: Four (4).

Dimensions: Minimum cross-sectional area one-half ($\frac{1}{2}$) by one and one-half ($1\frac{1}{2}$) inches, or equivalent, of wrought iron or steel.

Ladders.

Number: Four (4).

Dimensions: Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of side ladder treads shall be uniform within a limit of two (2) inches from top ladder tread to bottom tread of ladder.

Maximum distance from bottom tread of side ladder to top tread of sill-step, twenty-one (21) inches.

End ladder treads shall be spaced to coincide with treads of side ladders, a variation of two (2) inches being allowed. When construction of car will not permit the application of a tread of end ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder.

Hard-wood treads, minimum dimensions one and one-half ($1\frac{1}{2}$) by two (2) inches.

Iron or steel treads, minimum diameter five-eighths ($\frac{5}{8}$) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ($2\frac{1}{2}$) inches.

Location: One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder treads to corner of car.

Manner of application: Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

Stiles of ladders, projecting two (2) or more inches from face of car, will serve as foot guards.

Ladders shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and rivited over, or with not less than one-half ($\frac{1}{2}$) inch rivets. Three-eighths ($\frac{3}{8}$) inch bolts may be used for wooden treads which are gained into stiles.

Roof-Handholds.

Number: One (1) over each ladder.

One (1) right-angle hand-hold may take the place of two (2) adjacent specified roof-handholds,

provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

Dimensions: Minimum diameter, five-eighths ($\frac{5}{8}$) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$) inches.

Location: On roof of car: One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, **except** on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

Manner of application: Roof-hand-holds shall be securely fastened with not less than one-half ($\frac{1}{2}$) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ($\frac{1}{2}$) inch rivets.

Roof-Handholds.

Number: One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

Couplers.

Locomotives shall be equipped with automatic

couplars at rear of tender and front of locomotive.

Cars of construction not covered specifically in the foregoing sections, relative to hand-holds, sill-steps, ladders, hand-brakes and running-boards may be considered as of special construction, but shall have, as nearly as possible, the same completement of hand-holds, sill steps, ladders, hand brakes and running boards as are required for cars of the nearest approximate type.

"Right" or "Left" refers to side of person when facing end or side of car from ground.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent below size given is permitted.

And it is further ordered, That a copy of this order be at once served on all common carriers, subject to the provisions of said act in a sealed envelope by registered mail.

EXHIBIT B.

Order of the Interstate Commerce Commission,
March 13, 1911.

In the matter of the extension of the period within which common carriers shall comply with the requirements of an act entitled, "An act to supplement 'an act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotive with drivingwheel brakes and for other purposes,' and other safety appliance acts, and for other purposes," approved April 14th, 1910, as amended by "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1912, and for other purposes," approved March 4, 1911.

Whereas, pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by section 2 of the act aforesaid and section 4 of the act of March 2, 1893 as amended April 1, 1896, and March 2, 1903, known as the "Safety Appliance Acts;" and whereas the matter of extending the period within which common carriers shall comply with the provisions of section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown:

It is ordered, That the period of time within which said common carriers shall comply with the provisions of section 3 of said act in respect of the equipment of cars in service on the 1st day of July, 1911, be, and the same is hereby, extended as follows, to-wit:

Freight-Train Cars.

(a) Carriers are not required to change the brakes from right to left side on steel or steel-under-frame cars with platform end sills, or to change the end-ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13th, 1911.

(b) Carriers are granted an extension of five years from July 1, 1911, to change the location of brakes on all cars other than those designated in paragraph (a) to comply with the standards prescribed in said order.

(c) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order in respect of all brake specifications contained therein, other than those designated in paragraphs (a) and (b), on cars of all classes.

(d) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have ten or more inches end-ladder clearance,

within thirty inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at which time they must be made to comply with the standards prescribed in said order.

(e) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than ten inches end-ladder clearance, within thirty inches of side of car, to comply with the standards prescribed in said order.

(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to hand-holds, running boards, ladders, sill steps, and brake staffs: **Provided,** That the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of handholds (except end handholds under end sills), ladders, sill steps, brake wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed in said order.

Passenger-Train Cars.

(h) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

Locomotives, Switching.

(i) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

Locomotives, Other Than Switching.

(j) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 637.

OCTOBER TERM, 1916.

ILLINOIS CENTRAL RAILROAD CO., ET AL.,
PLAINTIFFS IN ERROR,

v.

GEORGE R. WILLIAMS,
DEFENDANT IN ERROR.

TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

REPLY BRIEF FOR DEFENDANT IN ERROR.

I.

Judgement Sustained on Common Law Grounds.

This suit was filed and prosecuted in the Trial Court on the Safety Appliance Act, the right of action being based upon the Supplemental Act of April 14, 1910; and, in presenting to this Court the theory that the Supreme Court of the State of Mississippi may have affirmed the case on common law grounds, we, in no manner, abandoned, or changed any position which we have taken in reference to the fact that the suit was based upon the Safety Appliance Act. Upon the other hand, we have consistently held to that view, and there has been no change of position from the trial in the Lower Court to the present time.

Notwithstanding all of this, it was perfectly competent for the Supreme Court of the State of Mississippi, looking through the record, to say that, although the action was based and prosecuted under the Federal Appliance Act, taking the record as an entirety, irrespective of any errors which may have been committed thereunder, it would sustain the judgment as a common

law action, and viewed as a common law action alone, substantial justice had been done.

Counsel for plaintiffs in error attack this position in the following language, page 3, Brief on Merits:

"In an action by a servant against his master to recover damages for injuries caused by defective or dangerous appliances or places, it must be alleged in the complaint that the master knew, or ought to have known of the alleged defects. Of course, it is perhaps not necessary that this appear by direct averment, but it must appear as a charge, either by direct averment or from the facts stated." (Citing 26 Cyc., 1390) "This above allegation is neither directly or indirectly made in the complaint."

In this respect, counsel for plaintiffs in error are entirely mistaken. The declaration, after charging the insecure and unsafe condition of the equipment complained of, contains the following averment:

"That sad defective condition was known to defendants, or could have been discovered by reasonable diligence, but was unknown to plaintiff." (See printed record, page 4.)

It is not contended that the declaration does not sufficiently charge negligence. The declaration is sufficiently broad to uphold and maintain a common law action, and in our brief on the merits, we have directed the attention of the Court to the evidence tending to support the same. In making this point, however, we, in no manner, change or alter our views in reference to the liability of the plaintiffs in error under the Safety Appliance Act.

If the Supreme Court of Mississippi, however, could have affirmed this judgment without deciding any of the Federal questions raised or passing upon the Safety Appliance Act in any respect, then, this Court is without jurisdiction, and the motion to affirm or

dismiss should be sustained. Not only that, but as we have already shown the Court by citation of authorities, the burden devolves upon plaintiffs in error to show that a decision of a Federal question, or, rather, of the Federal question relied upon, by the Supreme Court of the State of Mississippi was essential to the judgment affirmed. We have in our brief on the merits directed the attention of the Court to the authorities sustaining this position.

II.

Counsel for plaintiffs in error in their brief on the merits in this case, for the first time contend that no ladder was required by the Interstate Commerce Commission to be upon the car upon which defendant in error was injured, and, therefore, plaintiffs in error were not under obligation to have and maintain a secure hand-hold or grab-iron on the roof of the car at the top of the ladder. It might be sufficient for the purposes of this argument to say that this question was never raised, either in the Trial Court, in the Supreme Court of the State of Mississippi, nor was it raised in the original brief filed by counsel for plaintiffs in error, but is suggested only in the last brief filed by counsel. However, counsel for plaintiffs in error have again adopted a totally erroneous construction of the statute, a construction to which they are driven in their extremity. Section 2 of the Act provides specifically that all cars *having ladders* shall be equipped with hand-holds or grab-irons on the roof of the cars, at the top of the ladder. The meaning of Section 2 in this respect is that all cars requiring secure ladders and secure running boards should be equipped therewith. This requirement might arise either out of the nature of the car, the condition of the service to be performed by it, or the exigencies of the occasion, or it might be required by some order of the Interstate Commerce Commission. The Act, however, aside from all this, contained the further provision that all cars having ladders should also be equipped with handholds or grab-

irons on top of the car, at the top of the ladder. It was not the intention of Congress that only cars required by the Interstate Commerce Commission to have secure ladders should be supplied with such hand-holds or grab-irons. If such had been the congressional intent, it could have been expressed much more explicitly. ~~Counsel for the plaintiffs in error would have the provision construed as if it read as follows: "All cars must be equipped with secure sill steps and sufficient hand-brakes. All cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and shall also be equipped with secure hand-holds or grab-irons on their roofs, at the top of the ladders."~~

~~If such had been the congressional intention, this language probably and doubtless would have been in the statute,~~ but the congressional idea was that railroads were already using ladders; that they were in general use on April 14th, 1910; that a ladder on the side of a car was an invitation to an employee to use the same; that an employee, in the performance of his duty, finding a ladder at the side of a car would not be expected to first ascertain whether or not the ladder was required, but upon the other hand, had the right to assume that there would be a secure grab-iron or hand-hold at the top of such ladder. A railroad company equipping a car with a ladder leading to the top, would be estopped to say that it was not required to put a grab-iron or hand-hold at the top of the car, because the ladder itself was not only an invitation but a direction to the employee to perform his duties through such route, and the safety of such route in the performance of the duties of the employee was the idea which Congress had in mind. Congress knew that in preparing specifications for cars that the Interstate Commerce Commission would require ladders, and Congress also knew that at that time there were many cars in use having ladders thereon by which employees were expected to ascend; and, therefore, Congress used the all comprehensive term: "All cars having ladders

shall also be equipped with secure hand-holds or grab-irons on their roofs at the top of such ladders."

The declaration in this case alleges that the car in question did have a ladder leading to the top, and that it was the duty of the plaintiffs in error to provide a hand-hold or grab-iron on the roof of the car. (Printed transcript, page 5.) We have already directed the attention of the Court to the testimony, and, in fact it is undisputed, that the car in question had a secure ladder, and that the grab-iron or hand-hold was defective, and that defendant in error was injured, as a result thereof.

III.

At the trial of this case in the State Court, the plaintiffs in error did not plead the order of the Interstate Commerce Commission, nor any extension granted by it. But on appeal, however, to the Supreme Court, counsel for plaintiffs in error in their briefs, set out the various orders of the Interstate Commerce Commission, and contended that by reason thereof, the Act of April 14, 1910, was extended in its operation until July 1st, 1916. In this Court, in the original brief, counsel for plaintiffs in error have adopted the order of the Interstate Commerce Commission, the specifications, etc., and based their argument thereupon. So far as we are concerned, they may take either horn of the dilemma: that the orders of the Interstate Commerce Commission either are or are not before the Court. Counsel upon both sides, in their brief before the Supreme Court of the State of Mississippi, made elaborate arguments thereon, and the same course has been adopted in this Court, but we will not at this late day enter into any argument with counsel for plaintiffs in error as to whether the order of the Interstate Commerce Commission is properly before the Court or not, further than to say that, the same being an order, and the orders in question being of such great public concern, and being made in pursuance of a Federal Statute, and having to a certain extent the force of law, that it might therefore be assumed that the Court would take

judicial knowledge thereof, and we think this position is correct, and counsel upon both sides have evidently thought so, because the orders of the Interstate Commerce Commission have been availed of by counsel for each of the litigants.

Suppose, for instance, however, we leave the orders of the Interstate Commerce Commission out. Where will plaintiffs in error find themselves? Section 2 of the Act made it the positive duty of carriers on and after July 1st, 1911, to provide all cars having ladders, with grab-irons or hand-holds at the tops of the cars. Section 3 of the Act made it the duty of the Interstate Commerce Commission to provide standards of equipment for all time, until changed by them. In the absence of any evidence to the contrary, it would be assumed by this Court that the Interstate Commerce Commission performed its duties and provided a standard. There was no extension of time beyond July 1st, 1911, provided in Section 3, of the Act, or any other section thereof, and if the order of the Interstate Commerce Commission should be excluded from the record, as is now for the first time contended, then there was no extension of time for compliance with Section 3 of the Act of 1910, for any cars, beyond July 1st, 1911; but, upon the other hand, undisputedly and unquestionably, it will be the duty of the carriers to have, provide and maintain the equipment called for under Section 2 of the Act. The only authority whatsoever for making any extension of time when it should be the duty of the railroad companies to standardize their cars is found in the grant of power to the Interstate Commerce Commission, in Section 3 of the Act. There will be no presumption that the Interstate Commerce Commission made any extension of time, and in such case it would be the absolute duty of carriers to have their cars standardized by July 1st, 1911, and certainly, beyond any peradventure of doubt, there could be no excuse for a failure to have the equipment secure and safe. Counsel for plaintiffs in error in the Supreme Court of the State of Mississippi based their

entire grounds for reversal upon the position that the Interstate Commerce Commission, in allowing carriers five years within which to equip certain cars according to the standardized specifications, suspended the entire Act until July 1st, 1916; and that argument was elaborately urged in this Court in counsel's original brief. We think we fully met the argument by demonstrating that before plaintiffs in error could avail themselves of any immunity afforded by Section 3 of the Act, it became their duty to plead and prove (a) that the car in question was in use July 1st, 1911, etc. Counsel for plaintiffs in error seem to be impressed with the force of this argument, and now, in their last brief, totally abandon the original position assumed, abandon the order of the Interstate Commerce Commission, and say that the orders of the Interstate Commerce Commission are not properly before the Court at all. We trust that we may, without being discourteous to counsel, or appearing frivolous, suggest that like the proverbial "incense pot" the orders of the Interstate Commerce Commission have become uncomfortable. In this connection, we might call the attention of the Court to the fact that the orders of the Interstate Commerce Commission (see *Thornton*, page 490) did require ladders for cars like the one upon which defendant in error was injured, and also provided the specifications of the roof hand-holds. Cars in use July 1st, 1911, unless repaired in the meantime, provided their equipment was more than three inches from the standard, had five years within which to comply with the standard, but for all this record shows, the car upon which the defendant in error was injured may have been a car built since July 1st, 1911, or it may have been a car the equipment of which was not more than three inches from the standard, or it may have been one repaired in the meantime. In either event, under our view of the case, irrespective of any extension which the Interstate Commerce Commission was permitted to make under Section 3, of the Act, it would have been the absolute duty of the plaintiffs in error to provide safe and secure equipment.

IV.

Counsel for plaintiffs in error take the position that the equipment required by the Act of April 14, 1910, was equipment which cars did not have upon them and would have to be provided, and therefore, the Interstate Commerce Commission did not contemplate that carriers could comply by July 1st, 1911. In this, counsel are mistaken. The Act requires secure sill steps and hand-brakes, both of which were in general use; the Act did not absolutely require ladders and running boards under all circumstances, although both ladders and running boards were in general use on cars at that time. The Act did provide, however, that all cars having ladders, that is to say, having ladders on April 14th, 1910, should by July 1st, 1911, have such ladders secure and safe, with grab-irons or hand-holds on the roof of the car at the top of the ladder. Cars in use July 1st, 1910, which did not have upon them ladders or sill steps were required by the order of the Interstate Commerce Commission, if box, or other house cars, to provide ladders and grab-irons, etc., and such cars had five years within which to provide this equipment, unless such cars underwent repairs in the meantime. It is undisputed that the car on which defendant in error was injured had upon it a ladder. Necessarily, then, it was the duty of the plaintiffs in error to provide a hand-hold or grab-iron on the roof, at the top of the car.

V.

On page 28 of the brief on the merits, of counsel for plaintiffs in error, the following language is used:

"And in this connection we may further suggest that it should be noted with some interest that under the order entered by the Commission, above referred to, that Section 4, of the Act of 1893, is expressly excluded from the extension of time granted. If, therefore Section 2 then being under consideration by the Commission was not to be included in the

extension of time, why was it that the Commission did not clearly express it, as it did in relation to Section 4, of the Act of 1893?"

The answer is very obvious. Counsel is referring in the above quoted paragraph to Paragraph "F" *Thornton*, page 512, being a portion of the order of the Interstate Commerce Commission, providing for the extension of time within which carriers should comply with the standard specifications as to certain cars, not as to all cars, but as to cars in use July 1st, 1911. Paragraph "F" above referred to, gave cars in use July 1st, 1911, five years in which to standardize the equipment required by Section 2 of the Act. In other words, cars using the equipment for the first time required by section 2 of the Act would have five years, under certain conditions and modifications not necessary to note here, to make the same comply with the standards, but as to that portion of the equipment already provided by Section 4 of the Act of March 2nd, 1893, it would be reasonably presumed by Congress that the equipment was already much nearer standard. In other words, Section 4, of the Act of March 2nd, 1893, dealt only with grab-irons and hand-holds on the sides and ends of the cars. This equipment was required by the Act of 1893, and on April 14, 1910, all cars were necessarily provided with this equipment. There was no complicated standard, in fact it may be assumed that this equipment was more nearly standardized, which fully accounts for the difference, since the carriers had from March 2, 1893, to April 14, 1910, to make this equipment safe. But by the Act of 1910, Congress was requiring carriers for the first time to use equipment which they had not been obliged to use, such as ladders. It is true that ladders had, since March 2nd, 1893, become in very extensive and general use, but had not been required and had not, therefore, approached so near a uniform standard as would necessarily be expected of the hand-holds or grab-irons on the sides and ends of cars which had been required since March 2nd, 1893.

VI.

Counsel for plaintiffs in error, in their brief on the merits, contend for the first time, that it was necessary for defendant in error to allege and prove that ladders were required on the car in question by the order of the Interstate Commerce Commission. We have fully answered that argument in a preceding paragraph of this brief. We desire to suggest further, however, that even if their position was correct, and it is not correct, it would have been the duty of the plaintiffs in error to have made the point in the Lower Court. Suppose that the plaintiffs in error, at the conclusion of the evidence in the Court below, had made the point now for the first time made. Conceding for the sake of argument that the point be sound, which, however, we do not concede, it would have been a very easy matter for defendant in error to have introduced the order of the Interstate Commerce Commission, which undisputedly required ladders on such cars.

The identical question was passed upon by this Court in the case of *San Antonio and Arkansas Pass Railroad Company vs. Wagner*, decided by this Court on June 5th, 1916. In that case, which was a suit brought ostensibly under the Federal Employers' Liability Act, there was a failure on the part of the plaintiff to prove that the employer was engaged in interstate commerce. The point was not made in the trial Court, but the point was for the first time raised on appeal. This Court declined to reverse on that ground, saying:

"We shall decide the case upon that assumption, although we find nothing in the record to show that in fact the plaintiff was injured in interstate commerce at the time he was injured. The omission may have been due to oversight that would have been corrected if the point had been raised by the present plaintiff in error in the State Courts."

We respectfully submit, however, that defendant in error made out a *prima facie* case to show that the plaintiffs in error were engaged in interstate commerce;

that the duties of defendant in error required him to ascend the ladder on the car provided and used by them, and that there was a defective handhold or grab-iron on the roof of the car, at the top of such ladder.

On page 33 of their brief, counsel for plaintiffs in error cite the cases of:

Terre Haute Railroad Company vs. McCorkle,
140 Ind., 613.

Indianapolis & G. T. Co. v. Foreman, 69 N.
E., 669.

American Rolling Mill Co. v. Hollinger, 69,
N. E., 460.

New Bedford v. Higdon, 117 Mass., 445.

These cases all fall within the rule announced in our brief on the merits, under Title, "Affirmative Defense," pages 26 to 40. The defendant in error brought this case within the terms of the statute when he alleged that the plaintiffs in error were engaged in interstate commerce, used the car in question, that his duties required him to go upon the top of it, that the car had a ladder, and that the hand-hold or grab-iron on the roof of the car at the top of the ladder was defective and insecure.

We respectfully submit that the judgment of the Court below should be affirmed, and that damages should be awarded to the defendant in error, on account of this appeal, under Section 2, Rule 23, of this Court.

WILLIAM H. WATKINS,

Attorney for Defendant in Error.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

No. 637.

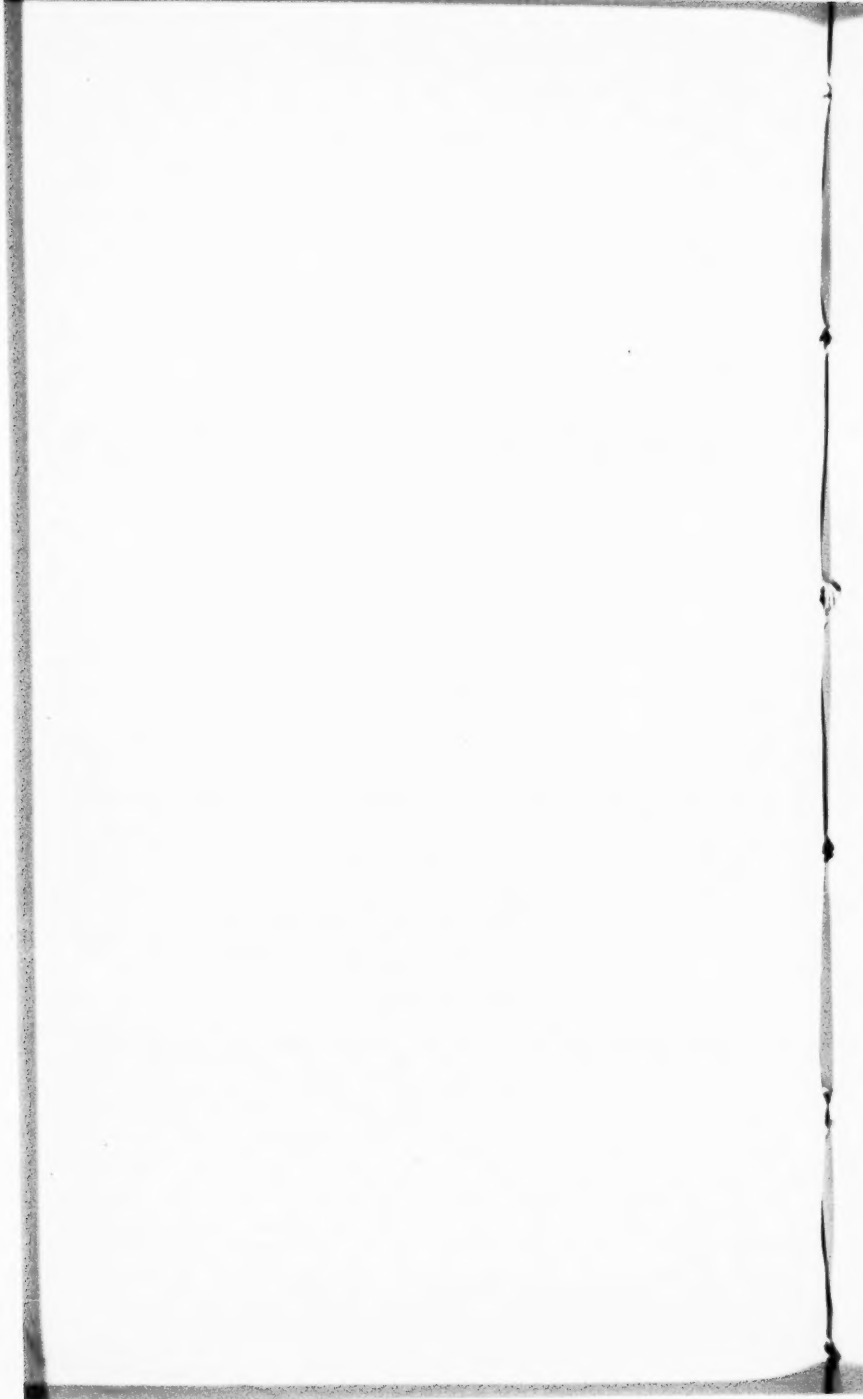
OCTOBER TERM, 1916.

**ILLINOIS CENTRAL RAILROAD CO., ET AL.,
Plaintiffs in Error.**

VERSUS

**GEORGE R. WILLIAMS,
Defendant in Error.**

**TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI.**



BRIEF ON THE MERITS FOR DEFENDANT IN ERROR.

The facts in this case have been fully stated in the briefs for defendant in error on motion to dismiss or affirm, and it will, therefore, not be necessary to re-state the facts here. The material facts necessary to a construction of the Safety Appliance Act of April 14, 1910, are sufficiently admitted in the statement of the case on the part of counsel for the plaintiffs in error, and, therefore, without any further statement of the case, we will present to the Court the concrete question of law relied on by counsel for plaintiffs in error for a reversal of this judgment.

It is the contention of counsel for plaintiffs in error that the Act of April 14, 1910, being an amendment to the Safety Appliance Act of 1893, was not in effect upon the 15th day of March, 1913, when the defendant in error received the injury sued for. If the Act was in effect in its entirety, or if the Act, for any purpose, was in effect March 15, 1913, according to the express admissions in brief of counsel for plaintiffs in error, the judgment of the Court below should necessarily be affirmed. Section 2, of the Act under discussion is in the following language:

"That on and after July first, 1911, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds or grab-irons on their roofs at the top of such ladders: *provided*, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

The section is clear and unambiguous in its provisions. It created the legal duty upon the part of the plaintiffs in error, after July 1, 1911, to have and maintain secure hand-holds on the top of the car in question for the purposes of the employment of the defendant in error.

This Court said in the case of *Tex. & Pac. Ry. Co. v. Rigsby*, decided April 15, 1916:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig., title, '*Action upon Statute*' (F), in these words: 'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done him contrary to said law.' (Per Hold, Ch. J., Anonymous, 6 Mod. 26, 27). This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Bl. Com. 51, 123; *Couch v. Steele*, 3 El. & Bl., 402, 411, 23 L. J. Q., B. N. S., 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week Rep. 170."

And we, therefore, find that the statute creating a positive duty upon the part of the plaintiffs in error necessarily imposed liability in favor of the defendant in error for the wrongs and injuries complained of. This Court has frequently said that a plain and unambiguous statute is its own construer, and this principle of law may well be invoked in the present discussion. The statute provides in express terms that on and after July 1, 1911, interstate carriers should provide and maintain secure handholds on the roof of their cars at the top of the ladder. The creation of this duty by the statute in question imposed liability upon the plaintiffs in error for a breach thereof. Such are the plain and express enactments of Section 2, of

the statute under discussion. We, therefore, affirm that the section is its own construer, and unless there is some other provision contained in a subsequent section of the Act modifying the plain and unambiguous provisions of Section 2, then the Act is in no manner susceptible of the construction sought to be placed thereupon by counsel for plaintiffs in error.

Finding that Section 2 is plain and unambiguous in its provisions, creating a positive duty hereinbefore stated, and imposing liability by reason thereof for a breach of such duty, let's analyze each subsequent section, and see if there is any modification of the language so carefully used by Congress in Section 2, of the Act.

(a) Section 3 of the Act is a standardizing provision of the Act in question, providing that within six months after the passage of the Act in question, that is to say, within six months after April 14, 1910, the Interstate Commerce Commission should designate the number, dimensions, location, &c., of the appliances required by Section 2, of the Act. The section then continues:

"And thereafter, said number, location, dimensions and manner of application, as designated by said Commission, shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act."

The Section then provides:

"That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act."

We find nothing in Section 3 to nullify or in any manner modify the express provisions of Section 2. By Section 2, Congress made it the duty of the interstate carriers by July 1, 1911, to make the appliances

referred to in the Section secure and safe. Congress knew that it was not performing its full duty in merely making the equipment safe; that there were in use at that time by the various railroad companies many standards of equipment, which, when in good repair, were perfectly secure and safe; and, therefore Congress was not satisfied with the provision of Section 2 that the equipment should be made safe and secure, but decided to go a step further and require of interstate railroad companies to construct their equipment according to certain standards to be adopted by the Interstate Commerce Commission. Therefore, Section 3 was enacted, not for the purpose of, or in any manner modifying or changing the effect of Section 2 but for the purpose of standardizing the safe and secure equipment provided by Section 2. This is all made very clear by a study of the Section in its entirety. The law makers contemplated that prior to the time the Act went into effect, the specifications of standard equipment would be adopted by the Interstate Commerce Commission. They also contemplated that all new cars constructed after the standards were adopted would necessarily be made to conform to the specifications provided by the Interstate Commerce Commission. It was a well known fact, however, that as to cars in use April 14, 1910, at the time of the passage of the Act, it would be impossible to standardize such cars within the period which might elapse between the adoption of the standards by the Interstate Commerce Commission and July 1, 1911; therefore, not for the purpose of relieving carriers of any liability for unsafe or insecure appliances but for the purpose of giving carriers time to comply with the standard provided by Section 3 of the Act, and in order to relieve them from the penalty provided for a failure to comply therewith, Section 3 contains the provision hereinbefore quoted, giving the Interstate Commerce Commission power and authority to extend the time when carriers should comply with Section 3 of the Act, not as to all cars, but as to cars in use at the time of the passage of

the Act. The reason of this provision is so obvious as to need no further discussion. There was no intention upon the part of Congress to relieve the carriers under Section 3 of any remedial liability in favor of an employe in having unsafe or insecure appliances in violation of Section 2, but the provision was intended for carriers to transfer the equipment on their old cars to the standards. Congress knew that this would require some time as to these old cars. We, therefore, state that there is nothing in Section 3 modifying or in any manner affecting the plain and unambiguous provisions contained in Section 2 of the Act. The Section contains the following language:

"That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section."

Counsel for plaintiffs in error would have the Court construe the Section as if it read as follows:

"That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this Act."

It will be noticed that the carefully chosen language used by the law-makers in this instance shows that if it had been the intention of Congress to confer power upon the Interstate Commerce Commission to extend the time for the enforcement and compliance with the entire Act, it would have used appropriate language. Upon the other hand, the language used indicates a well defined intention upon the part of the law-making body that Section 2 should go into effect July 1, 1911, but when it came to standardizing cars in use April 14, 1910, that the Interstate Commerce Commission should have authority to extend the time. And, in this connection, it might be proper to call the attention of the Court to the difference between the provisions of the Act in question and the Act of March

2, 1893. In that instance, Congress gave to the Interstate Commerce Commission power and authority to extend the time within which any carrier might comply with the provisions of the Act, Section 7 being as follows:

"That the Interstate Commerce Commission may, from time to time, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this Act."

The difference in the language used plainly indicates the difference in the congressional intention. This intention is further evidenced by the fact that upon March 4, 1911, Congress passed a subsequent Act, enlarging the powers of the Interstate Commerce Commission to extend the time within which certain carriers should comply with the provisions of Section 3, of the Act. The Supplemental Act is Section 8620 of the United States Compiled Statutes of 1913, which is as follows:

"The jurisdiction of the Interstate Commerce Commission to extend the period within which any common carrier shall comply with the provisions of Section 3 of the Act, entitled, 'An Act to supplement "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," and other safety appliance Acts, and for other purposes,' approved April 14, 1910, shall apply to cars actually placed in service between the date of the passage of said Act and the first day of July, 1911, in the same manner and to the same extent that it applies to cars actually in service upon the date of the passage of said Act."

The effect of that Act was to confer upon the Interstate Commerce Commission authority to extend the time when all cars in use July 1, 1911, should comply with Section 3, of the Act of April 14, 1910. The Act

is especially significant in that it only confers authority upon the Interstate Commerce Commission to extend the time within which a carrier subject to the provisions of the Act shall comply with *Section 3 of the Act*. Neither in the original Act of 1910 nor in the supplemental Act is there any power given, express or implied, upon the part of the Interstate Commerce Commission to extend the time when *Section 2* would go into effect, or extend the period within which any carrier should comply with the provisions thereof. The power conferred upon the Interstate Commerce Commission to grant an extension was by special congressional legislation confined and limited to certain cars, that is to say, cars in use April 14, 1910, and by the supplemental Act, cars in use at the time the Act should go into effect July 1, 1911. If the Act was not to go into effect until the Interstate Commerce Commission should make an order fixing the time when it should be complied with, why was there any occasion for Section 2 of the Act, or why was there any occasion for the Act of March 4, 1911, each of them being useless and idle?

(b) Section 4 of the Act of April 14, 1910, in no manner changes the express provisions of Section 2, of the Act under discussion. Upon the other hand, that section provides a penalty for violation of the Act of April 14, 1910, relieves the carrier of the penalty under a certain state of facts, that is to say, whenever a carrier should have appliances which were safe and secure and the same should become defective while in transportation, the equipment should be hauled to the nearest available point where such car might be repaired without incurring the penalty provided in the Act. However, Congress was careful to reserve to the employe the remedial provision provided in the Act, doing so in the following language:

"And nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe, caused to such employe by reason of or in connection with the moving or hauling of such car, with equipment

which is defective or insecure, or which is not maintained in accordance with the requirements of this Act."

Not only does Section 4 of the Act in question contain nothing modifying the plain and unambiguous provisions of Section 2, but, upon the other hand, it contains an express provision carefully guarding the rights of employes to enforce the liability imposed by Section 2 of the Act under discussion. This was made very plain in the case of *Tex. & Pac. R. R. Co. v. Rigsby*, *supra*, where the following language was used:

"It is argued that the statute does not apply except when the car is in use for transportation at the time of the injury to the employe, and that since it does not appear that the car in question was in bad order because of any negligence on the part of the railway company, and it was being taken to the shops for repairs at the time of the accident, there is no liability for injuries to an employe who had notice of its bad condition and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in the case of *Great Northern R. R. Co. v. Olos*, 239 U. S., 349, where it was pointed out that although Paragraph 4, of the Act of 1910 relieves the carrier from the statutory penalty while a car is being hauled to the nearest railroad point for repairs, it expressly provides that it shall not be construed to relieve the carrier of liability in a remedial action for the death or injury of an employe caused by or in connection with the moving of a car with defective equipment."

(c) Nor does Section 5 of the Act contain any provision modifying the requirements of Section 2 of the Act; upon the other hand, Section 5 contains the following provision:

"That, except within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment without incurring the penalty provided by the statute, but shall in all other respects be unlawful."

(d) Section 6 makes it the duty of the Interstate Commerce Commission to enforce the provisions of the Act in question.

Construction.

It might be well to examine for a moment the construction which has been placed upon this Act at the time of, during and since its passage:

(A) *After the Passage of the Act.*

After the passage of the Act of April 14, 1910, March 4, 1911, Congress passed the Act now found Section 8620, United States Compiled Statutes of 1913, which shows upon its face that the Congress of the United States never intended to confer upon the Interstate Commerce Commission any authority to postpone the time within which Section 2 of the Act of April 14, 1910, should go into effect, nor the time within which a carrier should comply with the provisions thereof. Upon the other hand, the Act contains reference to and makes provision only for the Interstate Commerce Commission's extending the time within which carriers should comply with Section 3 of the Act, and not with Section 2. There is not a syllable either in the original Act or in the Supplemental Act, both of which should be construed together, indicating any intention upon the part of Congress that the provisions of Section 2 should in any manner be altered, modified or extended beyond July 1, 1911, as to any cars whatsoever. Section 3 of the Act of April 14, 1910, had given the Interstate Commerce Commission authority to extend the time within which cars in use at the time of the passage of the Act should be made to conform to the standards, and since the standards were not adopted until March 1, 1911, it was considered but fair that the Interstate Commerce Commission should have the authority to extend the time within which carriers should comply with Section 3 as to cars in actual use to the time the Act went into effect.

(B) **Construction by the Interstate Commerce Commission.**

We find that the Interstate Commerce Commission has uniformly placed the same construction upon the Acts in question which we contend for. Upon the 13th day of March, 1911, the Interstate Commerce Commission, in pursuance of Section 3, of the Act of April 14, 1910, provided the standard of equipment referred to therein. The standards are full and complete, and will be found in *Thornton*, pages 462-510.

After adopting the standard equipment, the Interstate Commerce Commission then undertook to extend the time within which carriers should comply with Section 3 of the Act as to cars in use July 1, 1911. On page 511, quoting from the order extending the time within which carriers should comply with Section 3 of the Act as to certain cars, the following language is used:

"It is ordered that the period of time within which said common carriers shall comply with the provisions of Section 3 of said Act in respect to the equipment of cars in service on the first day of July, 1911, be and the same is hereby extended as follows:"

In other words there was no attempt upon the part of the Interstate Commerce Commission to extend the time within which any carrier should comply with Section 2, or to extend the operation of the Act itself; but the Interstate Commerce Commission, exercising the discretion which Congress had reposed in it, did undertake to extend the time within which carriers should comply with the provisions, not of the entire Act, not of Section 2, but of Section 3 of the Act as to cars in use July 1, 1911. Not only this, but we find that since July 1, 1911, the Interstate Commerce Commission has been continuously enforcing Section 2 of the Act of April 14, 1910.

We notice from a letter, dated November 16, 1915, written by Mr. G. B. McGinty, Secretary of the Interstate Commerce Commission, to Hon. W. R. Green,

at Council Bluffs, Iowa, one of the attorneys in the case of *Cook v. Union Pacific R. R. Co.*, 158 N. W., page 521, *infra*:

"HON. W. R. GREEN,

"Council Bluffs, Iowa.

"Dear Sir—In reply to yours of the 11th instant, please permit me to say that Section 4, of the Act of 1893, requiring a secure hand-hold or grab-iron, is in no manner repealed or suspended by any provision of the Act of April 14th, 1910.

"The provision of the latter Act, applying to the 'number, dimensions, location and manner of application' of grab-irons or hand-holds, in no way relieves the carrier from the obligation of the original Act to provide a 'secure hand-hold or grab-iron for the greater security to men in coupling and uncoupling cars.'

"The Commission is, as you say, prosecuting all cases where cars are in use which are not equipped with a 'secure grab-iron or hand-hold.'

"No case has been resisted by any railroad as far as we are at present informed upon the contention that there has been any suspension of the obligation to provide a secure hand-hold or grab-iron.

"This can readily be explained, for Section 5, of the Act of April 14, 1910, expressly says that nothing in the Act relieves the carrier from any of the liabilities or requirements of the Act of 1893 except as to movement of cars for repairs.

"As to roof hand-holds: The provisions of Section 2 of the Act of April 14, 1910, require roof hand-holds.

"This requirement became operative July 1, 1911, by the terms of the Act.

"For violation of the provision of Section 2, of the Act of April 14, 1910, that all cars having ladders shall be equipped with secure hand-holds or grab-irons on their roofs at the top of such ladders, the

Commission has instituted prosecutions, three of which are now pending.

"In the following cases the railroad carriers have confessed judgment: I. C. C. No. 2485, Court No. 4231, *United States v. St. Louis & San Francisco Railroad Company*, in the District Court of the United States for the Western District of Missouri, confessed August 13, 1915.

"I. C. C. No. 2390, Court No. 153, *United States v. Atlantic Coast Line Ry. Co.* in the District Court of the United States for the Southern District of Florida, confessed January 14, 1915.

"I. C. C. No. 2269, Court No. 15,300 *United States v. Wabash Railroad* in the District Court of the United States for the Southern District of Illinois, confessed November 16, 1914.

"I. C. C. No. 2060, Court No. 335, *United States v. Great Northern Ry. Co.*, in the District Court of the United States, District of Montana, confessed September 26, 1913.

"I. C. C. No. 2011, Court No. 544, *United States v. Kanawha & Michigan Ry. Co.*, in the District Court for the Southern District of West Virginia, confessed July 11, 1914.

"I. C. C. No. 1912, Court No. 15,234, *United States v. Wabash Railroad*, in the District Court of the United States for the Southern District of Illinois, confessed January 23, 1914.

"The only case contested was the case of the *United States v. Coal & Coke Railroad Co.*, I. C. C. No. 2029, Court No. 545, tried before a jury in the District Court of the United States for the Southern District of West Virginia, November 28th, 1913, in which case the Court ordered a verdict for the Government.

"It is thus apparent that the accepted interpretation of the Act is that the provisions of Section 2, of the Act of April 14, 1910, are in present effective operation and are not affected by the extension

order, a copy of which is enclosed herewith, which applies only to the 'number, dimensions, location and manner of application' of appliances.

Respectfully,

(Signed) G. B. McGINTY,
Secretary."

We quote this letter to show the Court the construction which the Interstate Commerce Commission has placed upon the Act since July 1, 1911, and for the purpose of showing the Court that the carriers subject to its provision have placed the identical construction thereupon. The Interstate Commerce Commission has successfully enforced the provision of Section 4, of the Act of 1910, in the Circuit Courts of Appeal in the following cases:

U. S. v. Trinity Ry. Co., 211 Fed., 448;

Chesapeake & Ohio Ry. Co. v. U. S., 226 Fed., 683;

U. S. v. Great Northern Ry. Co., 229 Fed., 927.

(C) Construction by Courts.

This Court in the case of *Tex. Pac. Ry. Co. v. Rigsby*, Advance Sheets, dated May 15, 1916, page 482, which was a suit for damages to an employe of an interstate carrier, under Section 2, of the Act of April 14, 1910, for a defective ladder, used the following language:

"It is earnestly insisted that Rigsby was not under the protection of the Safety Appliance Acts because, at the time he was injured, he was not engaged in interstate commerce. By p. 1, of the 1903 amendment, its provisions and requirements and those of the Act of 1893 were made to apply to 'all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce—and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith' subject to an exception not now pertinent. And by p. 5, of the 1910 amendment, the provisions of the previous Acts

were made to apply to that act, with a qualification that does not affect the present case. In Section 4 of the Act of March 2, 1893, which requires 'secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars,' this action was not based upon that provision, however, but upon p. 2 of the amendment of 1910, which declares: "All cars must be equipped with sill steps and efficient hand-brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds or grab-irons on their roofs at the tops of such ladders." There can be no question that a box car having a hand-brake operated from the roof requires also a secure ladder to enable the employe to safely ascend and descend, and that the provision quoted was intended for the especial protection of employes engaged in duties such as that which plaintiff was performing."

This Court in that case proceeded upon the theory that the Act of April 14, 1910, went into effect July 1, 1911, and if the position of counsel for plaintiffs in error is correct, enforced liability under the Act several years before the same went into effect.

The identical question was involved in the case of *Coleman v. I. C. R. R. Co.*, Supreme Court of Minnesota, 155, N. W., 763, the statement of facts being as follows:

"Defendant is a railroad corporation, engaged in interstate traffic, and as such comes within the statute. Plaintiff was in its employ as a brakeman, and on June 2, 1914, while engaged in the discharge of his duties as such, received the injury of which he here complains. In attempting to climb upon a box car, the rung of the ladder, insecurely fastened, pulled out, and plaintiff was precipitated to the ground and injured. The nature and character of the injuries are not important. The sole question

in the case is whether the Act of Congress referred to was in force and operation on the day plaintiff so received his injury. If it was, the case should have been submitted to the jury upon the issues of fact presented by the evidence. But if the Act was not then in force, the action was properly dismissed, for it is predicated wholly upon the alleged failure of defendant to comply therewith. This situation is conceded."

The Court below sustained a demurrer to the declaration upon the ground that the Act of April 14, 1910, did not go into effect until July 1, 1916. Upon appeal, however, the Supreme Court of Minnesota reversed the decision of the Court below, holding that Section 2, of the Act went into effect July 1, 1911, using the following language:

"The sole purpose of this part of the statute was to impose upon the railroads the absolute duty of maintaining their car equipments in safe condition for use. The language is clear and positive, and declares that on and after the date named it shall be unlawful to use such cars when not so equipped. It will not, as we read it, admit of qualification by judicial construction, and was intended to apply to cars in use at the time the Act was passed, as well as those thereafter brought into service. Section 3, upon which defendant relies in support of the contention that Section 2 was under suspension, relates to an entirely different branch of the same subject, and clearly was not intended as a qualification of the express provisions of Section 2. It was evidently deemed that the safety of the traveling public, as well as railroad employees engaged in the train service would best be protected by some uniform method or standard of car equipment applicable to all interstate roads, and to that end authority to fix such standard was, by Section 3, vested in the Interstate Commission. The reasons for the requirement of uniformity in equipment are plain. The cars of dif-

ferent roads operating throughout the states are promiscuously hauled, all are not equipped in the same manner, and a train composed of cars differently supplied with the appliances referred to in the statute results in confusion to the employes, and adds materially to the dangers connected with their work. With a uniformity of equipment, confusion is eliminated and danger of injury lessened. So, it seems clear that the sole purpose of Section 3, was to authorize the Commission to prescribe a uniform standard for the equipment of the cars of all the interstate railroads, and to require conformity therewith by such roads. The Commission was, by the terms of the statute, required to formulate rules fixing such standard within the time stated therein, and its order in the premises was given the force and effect of law. Congress had in mind that it would, as to some of the roads, be a practical impossibility to at once meet the demands of the new standard, and the Commission was further authorized to extend to them such time as would afford full opportunity of compliance. But, in so providing, it clearly was not the intention that during the period taken for installing the standard equipment, defective cars might be used and employed in the train service; nor was it intended that during that period, Section 2 of the Act should remain inoperative. If such had been the intention, then, that section might have been omitted altogether, and Section 3 made the substance and embodiment of the whole enactment. For then its operation would have been limited and in harmony with the contention of the defendant, namely, as an enactment requiring, within such time as the Interstate Commission might fix therefor, all railroads to equip and conform their cars to the standard there provided for. This view of the Act can not be adopted without doing violence to Section 2. Congress intended that section to be a part of the statute, and the clear language thereof can not be rejected, or held inoperative pending the installation

of the standard of equipment to be ordered by the Commission without running counter to the main purpose of the Act. The section must, therefore, stand, as a part of the statute, and be construed as imposing the duty upon railroads of maintaining their car equipment in secure and safe condition for use after July 1, 1911. Section 3 must be construed as a requirement of a uniform standard for such equipment, and that the extension of time within which to conform thereto has no reference to, and does not relieve from, the duty to maintain present equipment in secure and safe condition."

The identical question was presented in the recent case of *Cook v. Union Pacific Railroad Company* (Iowa), 158 N. W., page 521. The statement of the case in the opinion is as follows:

"Plaintiff brings this action as administratrix of the estate of one Paul O. Cook, under the provisions of the Federal Employer's Liability Act. She brings it for the benefit of herself, as surviving widow, and for the benefit of six minor children under the age of fourteen years, claiming that they were all wholly and solely dependent upon the deceased for maintenance and support. As a ground for action, she claims that on the 21st day of March, 1913, Cook was in the employ of the defendant as a brakeman on one of defendant's freight trains moving from Grand Island, Neb., to Council Bluffs, Iowa that when the train on which he was riding reached Central City, Neb., he was on the top of one of the cars, pursuing his duty as brakeman, and was sustaining himself by holding onto a hand-hold or grab-iron on the roof of the car, at the top of the ladder which extended down the side of the car; that while he was so sustaining himself, the hand-hold or grab-iron not being secure, gave way, by reason thereof, and deceased fell violently to the ground and received injuries which caused his death; that the deceased was not guilty of any fault or

negligence on his part, contributing to his injury and death, but his injury and death were due to the negligence of the defendant in this, that the hand-hold or grab-iron on the roof of the car on which he was seated, and of which he had hold just prior to the accident, was not secure as required by law, but, on the contrary, was unsafe and insecure; that by reason of his death, she has suffered damages.

"Defendant, answering this petition, admits sufficient facts to bring the case within the Federal Employer's Liability Act; admits that Cook was an employe in the service of the defendant as brakeman; admits that he came to his death near the town of Centra City, Neb., on March 21, 1913; but alleges that his death resulted from dangers and risks which were open, obvious, apparent and known to the deceased, and which were incident to his employment, and assumed by him; that he was guilty of negligence which approximately contributed to his death. Defendant further alleges that on March 13, 1911, the Interstate Commerce Commission of the United States extended the period of time within which defendant and all common carriers were required to comply with the provisions of the Safety Appliance Act, in so far as the Act required defendant to equip its freight cars with roof hand-holds at the top of the ladder. Defendant also filed a general denial to all the allegations of plaintiff's petition, not specially admitted."

In reference to which the Supreme Court of Iowa used the following language:

"The Commissioners were not given authority to suspend the provisions of Section 2, of the Act of April 14, 1910, or of the provisions of Section 4, of the Act of March 2, 1893. The authority given the Commission, as said before, was to fix standards, and then to extend the time in which the companies might adjust themselves to the new standard, or to the standards fixed, by changing the hand-holds,

already required and undoubtedly on the cars, to comply with the standards so fixed. Six months were given the Commissioners to fix the standards. They did not fix the standards until nearly a year afterwards, and, at the time they fixed the standards they made an order extending the time for five years in which to change and apply all other appliances on freight cars to comply with the standards prescribed in the order, made by the Commissioners, on all cars in use at the time of the taking effect of the Act of Congress requiring the placing of hand-holds. The standards fixed by the Commissioners, by the very Act that authorized them to fix standards, said that thereafter (that is, after the standards were fixed) they shall remain as the standards of equipment, and a failure to comply with the standards so fixed, after they are fixed, subjected the offending party to a like penalty as for a failure to comply with the requirements of the Act itself."

"It would seem, therefore, that the extension of time given by the Interstate Commerce Commission, relied upon, would not relieve the company of the obligation to discharge the duty imposed upon it by the second section of this Act. It could not be claimed that, if the Commissioners had never fixed the standards, the company would be immune from punishment if they failed to comply with the requirements of Section 2, and provided cars having ladders with secure hand-holds or grab-irons on the roof at the top of the ladders; nor could it be claimed that, if the Interstate Commerce Commission had failed to make any extension of time, then that the company would be relieved of the duty to comply with Section 2 touching hand-holds, even as to cars which were in use at the time of the passage of the Act.

"We are inclined to think that the power given to the Interstate Commerce Commission to extend the time in which common carriers were required to comply with the provisions of the Act related only to those provisions of Section 3, touching the stand-

ards to be fixed by the Interstate Commerce Commission. Or, in other words, it was intended that, when the Interstate Commerce Commission fixed the standards, all companies should change so as to comply with those standards in equipping their cars; that as to the cars already in use, or in use at the time of the taking effect of the Act, the Commissioners could extend the time for changing the equipment to comply with the standards. What the Commissioners undertook to do was to grant the carriers an extension of five years in which to change appliances on freight cars, to comply with the standards prescribed in the order. All cars put in use after the Act went into effect must be equipped as the Act required. All cars practically rebuilt were required to be equipped according to these standards fixed by the Commission. The authority delegated to the Commission was to fix standards, and to extend the time in which carriers who had cars already in use at the time of the Act, should comply with these standards, and equip their cars in accordance with the requirements of the standards. Until the Commissioners met and fixed the standards, the law did not require any particular standards, but said that the hand-holds should be placed as required by the Act, and be secure. The Act provided a penalty for a violation of Section 2, requiring hand-holds securely fastened on the roof of the car. Section 3 provided a like penalty for a failure to equip the car according to standards fixed by the Commissioners, for the Act says:

“ ‘Failure to comply with any such requirement of the Interstate Commerce Commission fixing the standards shall be subject to a like penalty as failure to comply with any requirement of the Act.’ ”

“We are inclined to think that the authority given the Interstate Commerce Commission, and the Act of the Interstate Commerce Commission in extending the time, did not relieve railroad companies from complying with the provisions of Section 2, as to

grab-irons on the roof, securely fastened; but did give authority to the Commissioners to extend the time, and they did extend the time in which the companies, operating cars at the time went into effect, were to make the changes in equipment to comply with the standards required by the order of the Commissioners. However this may be, it is certain that the Act gave to the Commissioners only the right to extend the time for compliance with Section 3, and the provisions of the Commission fixing standards as to cars that were in actual use at the time the Act went into effect."

We, therefore, respectfully submit that according to the plain and unambiguous provisions of the statute, that on and after July 1st, 1911, carriers were required to provide secure hand-holds at the top of ladders. As stated in the Rigby case, "*The statute imposes an absolute and unqualified duty to maintain the appliance in secure condition.*"

The following results follow the passage of the Act of 1910, in all of its provisions:

(a) Carriers had from March 14, 1910, to July 1st, 1911, to make the equipment provided in the Act secure.

(b) It became the duty of the Interstate Commerce Commission to provide a standard of equipment, and that all cars should conform to this standard, but that as to cars in use on or before July 1st, 1911, the Interstate Commerce Commission could extend the time for the carriers to comply with the uniform standard.

(c) On and after July 1st, 1911, the equipment referred to in the statute was required to be safe and secure. And all cars built after July 1st, 1911, would be expected to conform to standard.

These conclusions are inevitable because:

(1) They arise from the positive and unconditional and unqualified language of the Act itself.

(2) Such was the construction put upon the Act prior to its passage.

(3) Such was the construction put upon the Act by Congress itself, in the Act of March 4th, 1911.

(4) Such was the construction put upon the Act by the Interstate Commerce Commission in providing the standard of equipment, and such construction has been uniformly maintained by it because it has uniformly and constantly enforced the provisions of Section 2 of the Act, since July 1st, 1911.

(5) Such is the construction shown to have been placed thereupon by the railroad companies themselves, because they have voluntarily paid fines and penalties incurred under the Act, since July 1st, 1911.

(6) Such is the construction which has been placed upon the Act by this Court, the Circuit Court of Appeals, and the State Courts, where the Act has been brought into question.

The argument of counsel for the plaintiffs in error is based upon the theory that the time for the compliance with the provisions of the Act by the carriers was postponed until July 1st, 1916. It is merely necessary, in order to answer this argument, to refer to Section 3 of the Act itself. The only power which the Interstate Commerce Commission had to grant any extension at all, of time within which carriers should comply with any portion of the Act, is found in Section 3 thereof, and before the Interstate Commerce Commission could grant any extension whatsoever, it must necessarily be able to put its finger upon the grant of power, which grant is contained only in Section 3 of the Act. And we have already indicated to the Court that this grant of power to the Interstate Commerce Commission only permitted the Interstate Commerce Commission to extend the time within which carriers might comply with Section 3 of the Act, and not as to all cars, but as to cars actually in service prior to or on April 14th, 1910, and the time was afterwards ex-

tended by the Act of March 4th, 1911, conferring upon the Interstate Commerce Commission authority to extend the time within which carriers should comply with Section 3, not with Section 2 of the Act, as to cars inside July 1st, 1911; and the Interstate Commerce Commission in extending the time, conformed its order to the grant of power contained in Section 3, of the Act of 1910, and in the Act of March 4th, 1911, hereinbefore set out in full.

As a matter of fact, even as to cars in use July 1st, 1911, the Interstate Commerce Commission did not make an unconditional extension of time within which they should conform to the Standards. Paragraph G., Thornton, page 512, is in the following language:

"(g) Carriers are not required to change the location of hand-holds (except end hand-holds under end sills), ladders, sill steps, brake-wheels, and brake staffs on freight train cars where the appliances are within three inches of the required location, except that when cars undergo regular repairs they must be made to comply with the standards prescribed in said order."

By which it is provided that in cases where equipment was not more than three inches from the required location on any car, that the appliances should not be changed unless the car should undergo regular repairs.

And paragraph F, Thornton, on the same page, provides that any car, although in use July 1st, 1911, when undergoing regular repairs, shall conform to the standard.

So, we find that the argument of counsel for plaintiffs in error that the entire Act of April 14th, 1910, was suspended by the Order of Interstate Commerce Commission until July 1st, 1916, is in direct and utter contradiction with the plain and express terms of the Act itself, and in conflict with the orders of the Interstate Commerce Commission passed thereupon. The Interstate Commerce Commission never undertook to relieve the carriers of their duty as provided in Section 2 of

the Act of 1910, and never undertook to extend the time within which any carrier should make this equipment safe and secure, as provided in said Section 2. Upon the other hand, on and after July 1st, 1911, it was the imperative duty of each carrier engaged in Interstate Commerce, which included the plaintiffs in error in this case, to make its equipment absolutely safe and secure.

AFFIRMATIVE DEFENSE.

We have in the preceding pages fully presented to the Court our views to the effect that the Act of April 14th, 1910, went into effect July 1st, 1911, in accordance with the unconditional provisions thereof, and that after such date it was the duty of the carriers engaged in interstate commerce to maintain safe and secure hand-holds on the roofs of cars, at the top of ladders. It might be argued, however, in this case that the Interstate Commerce Commission having authority to extend the time within which any carrier should comply with Section 3 as to cars in service July 1st, 1911, that the Act did not go into effect until July 1st, 1916, as to such cars and the car in question may have been in use July 1st, 1911. The fallacy of this argument, of course, would lie in the fact that the Interstate Commerce Commission had authority only to extend the time within which carriers should standardize certain cars, that is to say, cars in use July 1st, 1911. But conceding this position merely for the sake of argument, and we protest that it is unsound and in the face of the express provisions of the statute, we respectfully submit that it was the duty of plaintiffs in error to plead and prove affirmatively the facts necessary to bring them within the immunity which it is contended that the order of suspension afforded to them.

In the first place, the time when a certain car was built would ordinarily be a fact within the exclusive knowledge of the railroad company. And as to whether or not a car had been rebuilt or as to whether or not the hand-hold at the top of the car was more than three inches from the standard adopted by the Interstate

Commerce Commission would also lie within the exclusive knowledge of the Railroad Company. In other words, even if this position should be correct, it would not be the duty of the defendant in error to allege and prove as part of his case that the car in question was not in use July 1st, 1911; or if in use July 1st, 1911, that its appliances were not more than three inches from the standard, and that the car had undergone repairs. Upon the other hand, if such facts constituted the defense of the Railroad Company, it was the carrier's duty to affirmatively plead and prove the same. This identical question was decided in the case of *Cook vs. Union Pacific Railroad Company* (*supra*), and was disposed of as follows:

"Even if we were to accept the defendant's contention, and say that the time granted by the Commissioners related to all cars in actual use at the time of the taking effect of the Act, and that no duty rested upon the company to have either secure or standard hand-holds on the roof at the top of the ladder of such cars at the time of the accident, yet we are met with the proposition that this Act could only, even under defendant's theory, relate to cars that were in actual use at the time of the taking effect of the Act. These cars, then, if defendant's contention is accepted, are to be excepted from the duty imposed upon carriers by Section 2, and excepted from that rule because of the action of the Commissioners. There is no evidence that the car in question was in actual use at the time of the taking effect of the Act. There is no evidence that this car comes within the exception that relieved the company from having hand-holds, required at the time of the accident. The defendant, seeking to avail itself of this exception, has the burden of proving that it is within the exception, and that this car was one of the cars to which the exception applied. There is no evidence upon this point. We cannot assume that this car was within the exception. The duty imposed by Section 2 is general, and rested upon

every company, from and after the 1st of July, 1911, and if defendant desired to avail itself of its own contention, it should have brought the car complained of within the exception to get the benefit of the extension. It is a general rule that where an action is predicated upon a statute to which there is an exception or proviso, if the proviso or exception be found in a separate section, or in a subsequent substantive enactment, it is a defense, and if relied upon, the facts that bring it within the exception must be pleaded and proven. This is a rule of general application. See *First National Bank of Davenport v. Baker*, 57 Iowa, 197, 10 N. W. 633; *State v. Van Vilet*, 92 Iowa 476, 61 N. W. 241. On this branch of the case, we must, therefore, hold against the defendant's contention."

This question was illustrated in the case of *United States vs. Trinity Ry. Co.*, 211 Fed., 448, which was decided by the Circuit Court of Appeals, Fifth Circuit, at New Orleans, La. That was a suit brought to recover penalties for the use of insecure equipment in violation of the Safety Appliance Act. Section 4 of the Act of 1910, which is under discussion in this case, provided that:

"Where any car shall have been improperly equipped as provided in this Act and the other Acts herein mentioned, or such equipment shall have become defective and insecure while such car was being used by such carrier on its line of railroad, such car may be hauled from such place when such equipment was first discovered to be insecure, to the nearest available point where such car can be repaired without liability to the penalties imposed by Section 4 of this Act, or Section 6 of the Act of 1893."

We have already called the attention of the Court to the fact that this provision did not constitute a defense to the carrier as against a suit by an injured employe, but by the provision contained in Section 4

of the Act of 1910, it was made a defense in so far as the penalties therein provided were concerned. In that case the government sued to recover the statutory penalty accrued on account of the violation of the Act. And the question arose as to the burden of proof in the case. The government in its declaration merely alleged the defective equipment. The railroad road company, see page 449, in a special plea, brought itself within the scope of the provisions contained in Section 4. See the special plea on page 449. The Government took issue thereupon, and it appeared that the car was found defective in Houston, but the railroad company hauled the car with the defective equipment to some other point, and the evidence tended to show on the part of the Government that the equipment could have been repaired in Houston. The question necessarily presented was whether it was necessary for the Government to show that the car could have been repaired at Houston, or if it was necessary for the railroad company to take the affirmative issue and establish by the burden or proof that the equipment could not have been repaired at Houston. The Court said:

"Unless the evidence of the defendant tends to show, in addition to the facts above recited, to-wit, that the car was properly equipped at starting on the journey and became defective while being used on the line of railroad of defendant, that the movement of the car in the train was necessary to repair the defect, and that the repair could not have been made except at such repair point, then the defendant has not brought itself under the proviso, and there was no question of disputed facts to submit to the jury. Certainly there is no evidence in the record that in the slightest degree tends to prove these last mentioned requisites. Bear in mind that under the Safety Appliance Act of 1893, and the Amendments, ignorance of defects does not excuse. The duty to have and maintain in good order the safety appliances required is a positive duty imposed on the carrier by the statute, and that the defendant in the

instant case seeks to avoid responsibility for the violation of this duty by pleading the proviso of the Act of 1910. By all the canons of construction, it must clearly bring itself within the terms of the proviso before it can demand immunity."

So, in this case, if it should be held that as to cars in use July 1st, 1911, the carrier had five years within which to standardize the equipment, and as to such cars the Act was postponed until July 1st, 1916, it was the duty of the plaintiffs in error in such case to bring themselves within the protection and immunity claimed. It would have been necessary for the plaintiffs in error to plead:

(a) That the car in question was in use on or before July 1st, 1911;

(b) That it had not been repaired or rebuilt to conform to the standards;

(c) That the hand-hold at the top of the car was more than three inches from the standard adopted by the Interstate Commerce Commission.

An argument of this character would be based upon the assumption that the order of the Interstate Commerce Commission extending the time which the carriers should have within which to comply with Section 3 of the Act of 1910 constituted an exception to the statute, and that it was necessary for the defendant in error to negative the exceptions. The statute, however, contains no exception after July 1st, 1911. The general rule is that wherever a pleading is based upon a statute and the enacting clause of the statute contains an exception, it is necessary for the pleader to negative the exception; but if the exception is stated subsequently to the enacting clause, or in some other statute, or is in the nature of a provision, then in such case the plaintiff makes out a *prima facie* case without negating the exception or provision, and the defendant must plead the same and bring itself within the immunity or protection afforded by the provision.

In *Cyc.*, Vol. 31, at page 115, the rule is stated as follows:

"When a party relies upon a statute which contains an exception in the enacting clause, such exception must be negatived, but where the exception occurs in the proviso or in any subsequent clause of the Act, such exception is a matter of defense, and need not be negatived." (Citing many cases in Note 49.)

The same rule is cited in *Cyc.*, Vol. 36, page 1238. And the identical question is presented in the case of *Bellenger vs. State* (Ala.), 9 So., 399. The Alabama Code contains the following provision:

"Any person who takes for temporary use, or using temporarily any animal or vehicle without the consent of the owner, must on conviction, be fined, but no prosecution must be commenced or indictment found, except upon complaint of the owner," etc.

An indictment was returned which did not allege that it was found upon complaint of the owner. The Court held, even in a criminal case, that such was a matter of affirmative defense, using the following language:

"The defendant contends that the indictment in this case is defective, in that it fails to charge that the prosecution was commenced or the indictment found upon complaint of Isaac Weatherly, the owner of the mule. This was not moved in defense, or in arrest of judgment of the Court below, but is urged before us as grounds of reversal. In *Clark vs. State*, 19, Ala., 552, it was said to be the correct rule on the subject, 'that if there be any exception contained in the same clause of the Act which creates the offense, the indictment must show negatively that the defendant does not come within the exception.' (Citing): 1 Bish. Crim. Proc., Section 635, quotes with apparent approbation the following language: 'If there is an exception in the enacting

clause, the party pleading must show that his adversary is not within the exception, but if there be an exception in a subsequent clause or subsequent statute, that is matter of defense, and is to be shown by the other party. See *Carson vs. State*, 69 Ala., 235; *Gratton vs. State*, 71 Ala., 344; 1 Bish. Crim. Proc., Section 631, *et seq.*"

In the case of *Bush vs. Wathen* (Ky.), 47 S. W. 600, where the identical question was under discussion as to whether or not a pleader should negative an exception or provision not contained in the enacting clause of the statute, the Court used the following language:

"1 Chit. Pl. (8th Am. Ed.) states the rule as follows, to-wit: 'In pleading upon statute, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, but if there be an exception in a subsequent clause, that is a matter of defense, and the other party must show it to exempt itself from the penalty.'

"And again on the next page (Chitty), Lord Tenderden is quoted as follows: 'If an Act of Parliament or private instrument contain in it, first, a general clause, and afterwards, a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it with the exception.' Blinn, Code Pl., 202, says: 'When the exception is embodied in the body of the clause, he who pleads for the clause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards, following proviso which is against him, he shall plead the clause and leave it to his adversary to show the proviso.' When exceptions to the general provision of a statute are found in a distinct clause, the plaintiff need not allege that he is not

within them. (Citing): *Nicholls vs. Sennitt*, 78 Ky., 630. The Court said in the case of *Com. vs. McClanahan*, 2 Metc. (Ky.) 10: 'It is well settled that where provisos and exceptions are contained in distinct clauses, it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisos which it contains. Nor is it necessary to allege that he is not within such provisos, even though the purview should expressly notice them, as by saying that none show the Act prohibited, except in cases thereafter excepted. These are properly matters of defense.'

The case of *Melzner vs. Raven Copper Co.* (Mont.), 132, at page 552, was a suit brought by a miner against the owner of the mine, under a statute containing the following language:

"Every person operating a mine shall be liable for a damage sustained by any employe thereof within this State when such damage is caused by the negligence of the hoisting engineer, etc., unless the employe himself was guilty of contributory negligence."

The Court held that it was unnecessary to allege or plead that he was not guilty of contributory negligence, using the following language:

"To our minds, the phrase 'without contributory negligence on his part,' is a mere proviso, or qualifying clause, inserted to forestall any possible interpretation of the statute, as also, abolishing the defense of contributory negligence, and this finds support in the consideration of the title and purview of the original enactment, which proviso need not be negatived in the complaint." (Citing): *Lorimer vs. St. Paul St. Ry. Co.*, (Minn.), 51 N. W., 125; *Rowell vs. Janvrion* (N. Y.), 45 N. E., 398; *Acker vs. Richards* (N. Y.) 71 N. Y. S., 929; *State vs. Stapp*, 29 Ia., 551; *Bliss on Code Pl.*, par., 202; *Phillips on Code Pl.*, par. 239."

See, also, the case of *Columbus & W. Ry. Co. vs. Bradford* (Ala.), 6 So., p. 90.

In *Bliss on Code Pleading*, par. 202, the rule is announced as follows:

"So, in an action upon a penal statute, if the proviso be in a separate section or a substantive clause, it is a matter of defense, and should be left to the other party. But if it be a matter of exception contained in the enactment or prohibiting clause, it is a part of the thing prohibited, and the pleading must show that this matter of exception does not cover the act complained of."

In the case of *Lane vs. Bell* (Tex.), 115 S. W., 918, where the question was presented as to the necessity of alleging and proving an exception contained in the statute, the Court said:

"With practical unanimity, the authorities seem to hold that where there is an exception embraced in the enacting clause of a statute, the plaintiff suing under the statute must, in his pleading, negative such exception, but a proviso contained in the same clause, or in a subsequent clause of the statute, is a matter of defense, and need not be negatived by the plaintiff seeking relief by the statute." (Citing): *Ry. Co. vs. Carter*, 20 Ill., 390; *Ry. Co. vs. Brown*, 23 Ill., 92; *Ry. Co. vs. Hanks*, 36 Ill., 281; *Lynch vs. People*, 16 Mich., 472; *Ry. Co. vs. Robeson*, 27 N. C., 391; *Tomlinson vs. Banika* (Ind.), 70 N. E., 155.

It is unnecessary to cite authorities to show that the rule in reference to the evidence and the burden of proof would follow the rule of pleading; that if it was the duty of plaintiffs in error to affirmatively plead the facts, bringing them or either of them, within the immunity which they claimed under the order of the Interstate Commerce Commission, then, as a matter of law, it was their duty to prove the same. The pleader who takes the affirmative assumes the burden of proof to establish such facts.

"The general rule is that whoever has the affirmative of the issue as determined by the pleadings, has the burden of proof." *Cyc.*, Vol. 16, page 926.

"Under the common law system of pleading, the burden of proof is on the party holding the affirmative of the issue to establish the substance of his contention, by the required preponderance of evidence." *Cyc.*, Vol. 16, page 298.

Suppose some employe goes upon a car, the hand-hold is defective, and he is injured. The employe is not even able to get the number of the car, and is unable under any state of facts, to show that the car was in use July 1, 1911, or when built, or, in fact, anything about it. Would this Court pretend to hold that the burden of proof would rest upon the injured employe in such case to show that the car in question was either not in use July 1, 1911, or that its equipment had been changed to comply with the Safety Appliance Act since that time, or that its hand-hold was not within three inches of the required location, and that the car had not been rebuilt or regularly repaired. We respectfully submit that certainly this Court will not permit the statesmanlike enactments comprising the Safety Appliance Act, upon which it has placed such statesmanlike construction, to be whittled away, and railway employes deprived of its benefits in such manner

Not Necessary to Negative Defensive Matter.

As a corollary to the foregoing proposition, we desire to state that it was never necessary for the plaintiff to negative defensive matter. In the case of *Hickman vs. R. R. Co.*, 66 Miss., 164, it was held by this Court that it was never necessary for a plaintiff in an action at law to negative contributory negligence, that being a matter of affirmative defense for the defendant, and the general proposition has been announced in this State that affirmative matters need not be negatived by the plaintiff in the following cases:

Kershaw vs. Bank, 7 Howard, 386;

Brown vs. Broach, 52 Miss., 536;

and the following are a few additional authorities which maintain the same proposition:

Flynn vs. Barnes (Ky.), 161 S. W., 523;
Schwartz vs. Brown, 119 N. Y. S., 1024;
Downey vs. Colorado Fuel & Iron Co. (Col.),
 108 Pac., 972;
R. R. Co. vs. Crosby (Ala.), 62 So., 889;
Gittings vs. Loper, 84 Fed., 102.

Other authorities might be cited upon this point without end. Therefore, we respectfully submit that if the order of the Interstate Commerce Commission referred to in this case, afforded to plaintiffs in error any immunity or relief, they should have affirmatively pleaded and proven the facts bringing them within the protection of the order. We do not mean to say that the Court will not take judicial notice of the orders of the Interstate Commerce Commission. As to that, it is not necessary for us to express an opinion, but we do state that if the facts contained in the order and the statute afforded the plaintiffs in error any defense, they should have by appropriate pleadings presented the same to the attention of the Court below.

In this connection, we call the attention of the Court to the recent opinion of this Court in the case of *San Antonio & Arkansas Pass Ry. Co. vs. Wagner*, decided by this Court June 5, 1916, *supra*. In that case, which was a suit brought ostensibly under the Federal Employer's Liability Act, there was a failure upon the part of the plaintiff to prove that the employer was engaged in interstate commerce. The point was not made in the trial Court, but the point was raised for the first time on appeal. This Court declined to reverse on that ground, saying:

"We shall decide the case upon that assumption although we find nothing in the record to show that in fact plaintiff was injured in interstate commerce at the time he was injured. We are asked to take notice of the omission of pleading and proof of the

fact as 'plain error,' and deal with it, although not assigned under paragraph 4 of Rule 29. We must decline to do this, principally for two reasons:

(a) The omission may have been due to an oversight that would have been corrected if the point had been raised by the present plaintiff in error in the State Courts."

So, we say, in the present instance, the plaintiff in error never suggested by any kind of pleading that the car in question was one in use July 1st, 1911, and which was not rebuilt since said date, and the equipment was more than three inches out of the standard, as provided by the Interstate Commerce Commission. For all that appears in this record, the car may have been one built since July 1, 1911, or it may have been one, though in use July 1, 1911, which had been completely rebuilt, or it may have been one of which, if in use July 1, 1911, the hand-holds at the top of the car may not have been more than three inches from the required standard. We respectfully submit that if plaintiff in error had, with its pleadings in the lower Court, sought to bring itself within the immunity which it now claims is afforded it by the statute, the defendant in error might have been able to show:

(a) That the car was not in use July 1, 1911;

(b) That it had been rebuilt since said time.

(c) That its standard of equipment at the top of the car was not more than three inches from the specifications adopted by the Interstate Commerce Commission.

What we have said in the present division of this discussion, however, is not by any means intended as an admission or concession that the statute did not go into effect July 1, 1911, as it expressly provided. What we mean to say is that even if the position be correct that is to say, stating the position from the standpoint of the plaintiff in error as strongly as the same can be stated, we respectfully submit that it was necessary

for the plaintiff in error, even if the position be sound which we deny, by affirmative pleading and proof to bring itself within the immunity in which it now seeks to take refuge. It has not done so, and as said in the Wagner case, so far as this record is concerned, and if it should be necessary to a decision of the case, in the absence of error, this Court may assume that the car was one built since July 1, 1911, or one which was rebuilt since said date, or one on which the standard of equipment was not more than three inches out of order.

We call the attention of the Court, however, to still another suggestion in reference to the subject matter. Questions of pleadings, even under the Federal statutes, are to be determined by State laws.

Roberts, Interstate Injuries, Par., 154;
Fleming vs. Norfolk Ry. Co., 160 N. C., 196;
Chesapeake & Ohio Ry. Co. vs. Kelly (Ky.),
 171 S. W., 185;
Gibson vs. Billingham, 213 Fed., 488;
Winters vs. Minneapolis & St. Louis Ry. Co.
 (Minn.), 148 N. W., 106;
L. & N. R. R. Co. vs. Stewart, 156 Ky., 550.

It is not only necessary for the plaintiffs in error to show that a Federal question was involved in the trial of this case; that is to say, absolutely necessary to a decision of the case; but plaintiffs in error must show that the Federal question was properly brought to the attention of the State Court. In other words, it is the duty of the plaintiffs in error, by appropriate pleadings, to bring to the attention of the Court below any facts affording them special immunity, or protection from the provisions of the Act of April 14, 1910. For all this record shows, the Supreme Court of the State of Mississippi may have been of the opinion and decided, that it was unnecessary for it to decide whether the Act went into effect July 1, 1911, or July 1, 1916, because the plaintiffs in error never by any kind of pleadings or evidence showed that the car upon which defendant in error was injured was a car actually in service July 1, 1911.

Miller v. Nichols, 4 Wheat. 311, 4 Law. Ed., 578;

Hamilton Mfg. Co. v. Mass., 6 Wall., 632, 18 Law. Ed., 904;

Southern R. R. Co. v. Carson, 194 U. S., 136, 48 Law. Ed. 907;

Loeb v. Columbia Township, 179 U. S., 472; 45 Law. Ed., 280;

Phoenix-Insurance Co. v. Gardner, 11 Wall., 204, 20 Law. Ed., 112.

We do not mean to say that a Federal question was not involved in this case. The suit was brought under the Safety Appliance Act, and, necessarily, presents a Federal question; but every Federal question presented by the pleadings in the case was foreclosed by the decision of this Court in the Rigsby case, *supra*, and cases cited therein. What we mean, however, is that the plaintiffs in error in the Court below never suggested by any kind of pleading that the Act of April 14, 1910, was not in effect; nor did they ever claim that the car in question was one in actual service July 1, 1911, that it had never been repaired, or that its equipment was more than three inches from the standard.

Counsel for plaintiffs in error in their brief use the following language:

"It will be observed that under the third clause, the privilege, right or immunity must be specifically set up or claimed to give this Court jurisdiction; but where the validity of a treaty or statute of the United States is raised, or an authority exercised under the United States is drawn in question, and the decision by the State Court is against their validity, it has been decided that if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, the fact that it was not specifically set up and claimed is not conclusive against the review of such a question in this Court."

We do not mean to take the position that a Federal question is not raised unless specially set up. What we mean to say is that if any immunity could have been afforded to the plaintiffs in error by reason of the fact that the car in question was in use July 1, 1911, and under the order of the Interstate Commerce Commission, it had five years within which to become standardized, then such facts constituting the immunity should have been specifically set up.

Record Indicates Equipment Was Standardized.

In this case, although there was no pleading filed by the plaintiffs in error raising the question now under discussion, still the record abounds with references fairly well establishing the fact that the car upon which defendant in error was injured had been standardized.

Defendant in error himself testified that the car in question had a ladder on it, and that the ladder was defective. (See Tr., page 33.)

C. T. Earle, a witness for the defendant in error, testified that the car had a ladder on it, and states that the hand-hold on the top of the car had been fastened with a bolt. (Tr., page 117). It will be noted that the specifications adopted by the Interstate Commerce Commission required the hand-holds to be securely fastened with bolts; see *Thornton*, page 471.

C. P. Stewart, a witness for the defendant in error (Tr., page 236), who was an inspector for the plaintiffs in error, on February 25, 1913, examined the car in question and his testimony contains inferences that the car had been standardized.

And Mr. G. W. Hill, a witness for plaintiffs in error, testified as to the conditions of the hand-hold after the accident, from which testimony it might well be inferred that the hand-hold at the top of the car had previously been made to conform to the standards adopted by the Interstate Commerce Commission. (See transcript, page 241.)

The plaintiff in error did not deny that the car in question was one built since July 1, 1911. They do not deny, and make no pretense that if the car in question was one in use July 1st, 1911, that its equipment and appliances had not been brought to the standard. They place themselves, however, upon the position that the entire Act was postponed in its effect until July 1st, 1916, a position which is in utter contradiction to the plain and express provisions of the Act.

The Interstate Commerce Commission was never given authority to postpone the time when the Act would go into effect. The Act went into effect July 1st, 1911. The Interstate Commerce Commission was given authority to extend the time within which carriers might comply with Section 3 of the Act, as to certain cars in use July 1st, 1911.

This question is illustrated in the case of *U. S. vs. Great Northern Ry. Co.*, 229 Fed. 927. In that case, suit for a penalty was brought by the United States against the Great Northern Railway Company for maintaining a train of cars without efficient brakes, as provided in the Act of 1893, 1903, and the amendment of 1910. The Act of 1893 provided that not less than fifty per cent of the cars in a train should be so used that brakes could be operated without the use of the hand brakes, and the Interstate Commerce Commission was given authority to increase the number. Accordingly, on June 6, 1910, the Interstate Commerce Commission entered an order requiring 85 per cent of the cars susceptible of being moved by the air brakes. See *Thornton*, p. 460,

In that case, suits were brought because some of the cars upon the train had to be operated by hand brakes, and the railroad company pleaded and proved that more than 85 per cent of the cars on the train could be operated by air brakes, and that this was a complete defense to the suit. The Circuit Court of Appeals, 9th Circuit, through Judge Gilbert, said:

"In view of the protection which was intended to be afforded by this Act, it would have been idle for Congress to require that freight trains must be equipped with appliances to operate a power brake system, and at the same time leaving it optional with the railroad company to decide whether it would or would not operate its trains with that system. To say which trains would be provided with power brakes, and in the same breath to say if the carrier refused to get them, is to contradict the very purpose and terms of the Act. If such is the effect of the law, it will be given the construction contended for by the defendant in error."

Decision Affirmed on Common Law Ground.

The Supreme Court of the State of Mississippi delivered no written opinion, and irrespective of the fact that the action was predicated on a Federal Statute, may have come to the conclusion that a decision of the question as to whether the Act of April 14, 1910, went into effect July 1st, 1911, or July 1st, 1916, was unnecessary. The Court may have come to the conclusion that looking at the record in its entirety, that the judgment could be sustained as a common law action, notwithstanding the fact that the action was brought under the Safety Appliance Act and the instructions by the Trial Court were predicated thereupon. The fact that the defendant in error was injured in the regular course of his employment through a defective hand-hold was undisputed, and the great weight of testimony established the fact that the roof of the car was rotten and decayed. (See testimony of C. T. Earle, Tr. 67; and John M. McGinnis, Tr. 16.)

The Supreme Court of the State of Mississippi has a set of rules, rule No. 11 being as follows:

"No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or other error as to the matter of pleading or procedure, unless it shall affirm-

atively appear from the whole record that such judgment has resulted in a miscarriage of justice."

This rule was brought in question before the Supreme Court of Mississippi in the case of *Preston Jones v. State*, 104 Miss., 871, and the Supreme Court of Mississippi said that the rule came from the common law, and was valid and enforceable, and sustained the same.

The plaintiffs in error must affirmatively show, not only that a Federal question was adjudicated by the State Court, but that a decision of the Federal question was absolutely essential to the judgment rendered.

Adams v. Russell, 229 U. S., 353, 57 Law. Ed., 1224;

R. R. Co. v. Swann, 111 U. S., 379, 28 Law. Ed., 462;

Gray v. Evans, 97 U. S. 1, 24 Law Ed., 291;

Jenkins v. Lowenthal, 110 U. S. 222, 28 Law. Ed., 129;

State ex rel. Citizens' Bank of Louisiana v. Board of Liquidation, 98 U. S., 140, 25 Law Ed., 114;

Waters-Pierce Oil Co. v. Texas, 212 U. S., 86, 53 Law Ed., 417;

Gaar, Scott & Co. v. Shannon, 223 U. S., 468, 56 Law. Ed., 510;

Railway Co. v. Duval, 225 U. S., 477, 56 Law. Ed., 1171.

The record disclosed the fact undisputedly that while this defendant in error was injured upon the 15th day of March, 1915, there had been no inspection by the plaintiffs in error since the 25th day of February prior thereto. (See testimony of C. P. Stewart, Tr. 236.) Therefore, the Supreme Court of the State of Mississippi, looking at the record as an entirety, may well have come to the conclusion that there had been no miscarriage of justice, and that on common law grounds, it would affirm the decision of the trial Court.

In fact, on oral argument of the case in the Supreme Court of the State of Mississippi, the judges indicated that on the facts stated, they might sustain the verdict on common law grounds.

We, therefore, respectfully ask that the judgment of the Court below be affirmed.

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